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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MEYERS INDUSTRIES, INC.,
Petitioner and Intervenor Applicant,

and

NATIONAL LABOR RELATIONS BOARD,

v.

KENNETH P. PRILL,
Respondent.

MOTION OF MEYERS INDUSTRIES, INC. FOR LEAVE TO INTERVENE

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v.

KENNETH P. PRILL,

Respondent.

MOTION FOR LEAVE TO INTERVENE

Meyers Industries, Inc., the charged party in Case No. 7-CA-17207 before the National Labor Relations Board ("Board"), pursuant to Rule 42 of the Rules of the

Supreme Court, hereby moves this nonorable Court for leave to intervene to petition for writ of certiorari from the decision of the United States Court of Appeals for District of Columbia Circuit, and in support thereof sets forth the following:

1. FACTS

Meyers Industries, Inc., as an employer, was charged by Kenneth Prill, its employee, with a violation of Section 8(a)(1) of the National Labor Relations Act ("Act") for discharging him by allegedly interfering with his rights guaranteed under Section 7 of the Act. Although the agency's Administrative Law Judge found the 8(a)(1) violation, on review, the Board reversed the findings of the Administrative Law Judge, and found that although Kenneth Prill had been discharged for refusal to

drive an unsafe truck, that refusal was not "concerted activity" within the meaning of Section 7 of the Act. At the conclusion of the Board's opinion, Meyers Industries, although the aggrieved party to the Administrative Law Judge's decision, was no longer in jeopardy because the Board had dismissed the complaint against the Company. As the basis for its decision the Board reversed a line of its previous decisions beginning with Alleluia Cushion Company, Inc., 221 NLRB 999 (1975), a decision holding that in non-collective bargaining cases when an employee "seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, [the Board] will find implied consent thereto and deem such

activity to be concerted." 221 N.L.R.B. 999, 1000 (1975).

On review of the agency's decision, the Court of Appeals for the District of Columbia disagreed with the Board's position that its definition of "concerted activities" was compelled by its interpretation of Section 7, and found that the Board failed to properly exercise its statutory discretion. Based upon this finding the appellate court, over Judge Bork's dissent, remanded the case to the Board for reconsideration in light of this Court's recent decision in N.L.R.B. v. City Disposal Systems, ____ U.S. ___, 104 Sup. Ct. 1505 (1984), a case in which the Court, citing the Board's wide discretion, upheld an NLRB decision giving a broad interpretation to the term "concerted activities" in a situation where a single employee acted,

unlike this case, within the umbrella of a collective bargaining agreement. The practical effect of the D.C. Circuit's decision was to place Meyers Industries in a position of extreme vulnerability once again.

2. Meyers Industries' Interest.

At the time of the Board's decision, Meyers Industries' vulnerability was all but eliminated, and when Kenneth Prill exercised his statutory right to petition the Court of Appeals for review the Company concluded that its position would be vigorously defended by the Board's attorneys, and that its efforts, had it timely intervened, would have been duplicative and very expensive. At that time, early 1984, the Company was in a severe financial situation which required that all costs incurred must be critical to the Company's effort to remain solvent.

Moreover, the Company concluded that its interests in the D.C. Circuit were identical with those of the National Labor Relations Board and therefore would be completely protected.

However, the D.C. Circuit's final order places Meyers Industries in an extremely difficult position. Although the company had succeeded before the Board, the Board has failed to sustain the common position on review. Meyers Industries' argument has consistently been that the Board's 1975 decision in Alleluia Cushion was an improper application of the phrase "concerted activities" in Section 7 of the Act, and therefore should be reversed. Although the Board has taken this same position in its decision and in its position on review, it has done so based upon its view that

its definition is mandated by the Act. The appellate court did not overrule the substance of the Board's decision, rather it concluded that the Board's actions were not mandated but were discretionary, and remanded the case for reconsideration in light of N.L.R.B. v. City Disposal Systems.

We have been informed that the NLRB will not file a petition for writ of certiorari. Thus, Meyers Industries' interests at this point can only be protected by permitting the Company to intervene for the limited purpose of seeking and participating in review before this Court. For these reasons, the petitioner has significant interests at stake should the Court elect to hear this case.

3. Timeliness of the Intervention

Meyers Industries, as the charged party in the proceeding before the agency,

is "a person aggrieved" within the meaning of Section 10(f) of the Act, enabling such a party to seek immediate review in the appropriate Court of Appeal, U.A.W. v. Scofield, 382 U.S. 205, 210 (1965), with the right to intervene in the Court of Appeals in any case for enforcement or review of the Board's orders. Id. at 208. This right is integral to the statutory scheme which recognizes the need to blend the private and public interests at stake. Id. at 219, 220. Had Meyers Industries intervened pursuant to Rule 15(d), Fed. R. App. P., the Company would unquestionably have standing to seek a writ of certiorari from the decision of the D.C. Circuit. See Steelworkers v. N.L.R.B., 373 U.S. 908 (1963).

Rule 15(d) Fed. R. App. P. requires that a person desiring to intervene at

the Circuit Court of Appeals in a review of an agency decision must file their petition within 30 days of the date on which the petition for review was filed. However, Meyers Industries did not petition for intervention within the 30 day limit and did not participate in any way throughout the proceeding.

The D.C. Circuit issued its decision on February 26, 1985, and Meyers Industries moved the appellate court to intervene after decision on May 14, 1985. That motion and a subsequent motion for reconsideration were denied on May 20, 1985 and June 11, 1985 respectively.1/

1/ The Appellate Court's denial of intervention is the subject of a separate petition for writ of certiorari. That separate Petition is only filed provisionally in the event the Court determines that it is procedurally inappropriate to consider the instant motion to intervene.

We ask this Court to permit Meyers Industries to intervene at this stage for three substantial reasons: First, Meyers Industries' failure to intervene at the appropriate time is excusable neglect. Second, Meyers Industries' purpose for intervention is only to protect its interests before the United States Supreme Court - interests which will not be protected by the National Labor Relations Board. Third, there is no possibility of prejudice to already existing parties.

(a) Meyers Industries petition for intervention is timely. The D.C. Circuit's decision was issued on February 26, 1985. Had Meyers Industries been a party at that time, the Company could have timely filed its petition for certiorari any time before May 26, 1985. Instead, the Company filed a petition to intervene at the Court of Appeals, for the

purpose of appeal only, on May 14, 1985, which was denied on May 20, 1985, and a motion for reconsideration on June 12, 1985. Contemporaneously, Meyers Industries requested this Court to extend the time for filing its Petition for Writ of Certiorari until July 26, 1985, which request was granted on June 3, 1985, without comment on Meyers Industries' standing before this Court.

The National Labor Relations Board also requested and received extensions of time in which to file its petition for writ of certiorari, first until June 26, 1985, then until July 26, 1985.

Thus, the Company's original petition to intervene was filed with the D.C. Circuit within the time to appeal from that Court's decision, and this motion to intervene is made within the time permitted to petition for Writ of Cer-

tiorari, as determined by the extensions granted the National Labor Relations Board.

In United Airlines v. McDonald, 432 U.S. 385 (1977), this Court considered a request to intervene on appeal by a class of flight attendants who had been denied class status but waited until after the District Court's final decision before attempting to intervene for the purpose of appeal. In holding that McDonald's request for intervention was timely, this Court considered whether the other party (United) was prejudiced and whether McDonald acted promptly after the final decision. Id. at 394. In finding that there was no prejudice to United and that McDonald acted promptly, the Court held that, "the critical inquiry in every such case is whether in view of

all the circumstances [the] intervenor acted promptly after entry of final judgment." (Citations omitted) Id. at 395, 396. In McDonald, the Court found the intervention on appeal timely because she had "filed her motion within the time in which the named plaintiffs could have taken an appeal." Id. at 396.

As in McDonald, Meyers Industries filed requests to intervene on appeal, both at the D.C. Circuit and in this Court, within the time during which the National Labor Relations Board could have filed its Petition for Writ of Certiorari.

(b) The failure to intervene earlier is excusable. As discussed above, at the time for intervention under Rule 15(d) Meyers Industries was in an impecunious state that did not reasonably permit it to expend monies for purposes that did not

directly affect its financial position in a positive way. Moreover, the Board, having adopted Meyers Industries' legal positions, was fully capable and did vigorously pursue those interests before the appellate court. Most importantly, at the present time, the Council for Labor Law Equality ("COLLE"), a nation-wide non-profit association whose purpose is to protect the legal interests of employers in matters dealing with labor law - especially on issues involving the delicate balance of the national labor policy - has most recently agreed to provide the legal assistance necessary to protect Meyer Industries' interests in this matter. Without COLLE's assistance, Meyers Industries would still not be in a position to be able to afford the expenses involved in petitioning for writ of certiorari. Meyers had previously been unaware of the

existence of COLLE. Because of this Meyers is now able to file this motion to intervene, despite the inability and failure to intervene under Rule 15(d).

(c) Meyer Industries' interests cannot otherwise be protected. This Court has recognized that when the government, as in this case, refuses to seek review of an adverse decision, the private individual whose interests were represented by the government agency, although not a party to the decision below, has a significant interest to protect. In Banks v. Chicago Grain Trimmers, 389 U.S. 813 (1967), this Court granted intervention to an individual claimant under the Longshoremen's Act when the Department of Labor declined to seek a writ of certiorari after decision of the Court of Appeals.

The Banks case is similar to this in that the petitioner widow was not a party to the case before the Seventh Circuit or the District Court and elected to pursue review for the first time in this Court.

Moreover, at least one federal circuit has concluded that when the government has abandoned its statutory right to appeal, the injured private party should be permitted intervention to appeal. See e.g., Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C. Cir. 1944), a case permitting property owners to intervene after decision when the zoning commissioner failed to take appeal from an adverse zoning order, and Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. (1967), a case permitting intervention on appeal by a private individual when

the Department of Justice failed to perfect the appeal and the intervenor's rights were placed at risk by the decision of the trial court. Both of these cases were cited with approval by this Court in McDonald, 432 U.S. at 395, n. 16.

In addition, this Court has granted intervention after decision of the Court of Appeals in several instances where an aggrieved union, not a party to the decision before the Court of Appeals, sought intervention in the case after certiorari had been granted. NLRB v. ACME Industries, 384 U.S. 925 (1966), and Beth Israel Hospital v. NLRB, 435 U.S. 940 (1978).

As in Banks, Meyers Industries is aggrieved by the decision of the D.C. Circuit and requests the opportunity to protect its interests, even though the

government agency is no longer seeking review by this Court. A denial of intervention would place the protection of Meyers Industries interests entirely in the hands of the government, whose interests, it appears, are not necessarily the same.

(d) Intervention will not prejudice any of the other parties. No delay will be occasioned by permitting Meyers Industries to intervene in the proceedings before this Court. The addition of Meyers Industries as a party before this Court cannot and will not increase the burden of either of the parties other than the possible requirement, if desired, to respond to the issues raised by the Company. There is no additional discovery, no additional witness to be examined, and no further proceedings to be held. The entire

appellate process involves writing the briefs to this Court and the limited time for oral argument.

In summary, the issue at stake herein is whether the Board's action in overruling Alleluia Cushion was properly done within the agency's statutory discretion. This is a significant issue involving the administration of the National Labor Relations Act. Certainly, the Board's view, that the language of the statute compelled it to overrule Alleluia Cushion, is far reaching. The appellate court's finding that the Board's decision ran afoul of this Court's teachings in City Disposal has even greater impact on the administration of the Act because of the restraints that holding places on Board process. Whether it is allowed to stand or is ultimately reversed, this decision will affect Meyers Industries

and all employers for a long time. Without question, it is a matter of grave national interest.

4. Conclusion

For these reasons, we respectfully request that Meyers Industries be permitted to intervene for the purpose of seeking review of the decision of the D.C. Circuit as set forth in the Petition for Writ of Certiorari filed concurrently with this motion.

Respectfully Submitted,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

Whether the National Labor Relations Board properly exercised its discretion by determining that in cases not involving a collective bargaining agreement "concerted activity" under § 7 of the NLRA requires that employee conduct be engaged in, with or on the authority of other employees, and not solely by and on behalf of an individual employee.

Whether the Board properly exercised its discretion by establishing that in cases not involving a collective bargaining agreement the General Counsel has the burden of proving the existence of concerted activity by demonstrating the support of other employees without relying on any presumption.

Whether the Court of Appeals erred by remanding the case based on its opinion that the Board's current standard is narrower than its previous standard, even though it failed to disturb any of the Board's findings of fact and does not hold the Board's interpretation of the Act unreasonable.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Meyers Industries, Inc.[1] petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to review the judgment in Prill v. NLRB, 755 F.2d 941.

---

1. A wholly owned Michigan Corporation.

No._____

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Meyers Industries, Inc. hereby petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to review the judgment in Prill v. NLRB, 755 F.2d 941 (D.C. Cir. No. 84-1064, February, 26, 1985).

OPINION BELOW

The 1984 decision of the National Labor Relations Board is reported at 268 NLRB 493, and is represented at pages 1-40 in the Appendix to this Petition ("App."). The opinion of the United States Court of Appeals for the District of Columbia is reported at 755 F.2d 941, and is reprinted at pages 42-162 in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on February 26, 1985. On June 3, 1985, Chief Justice Burger signed an order extending the time for Meyers Industries to file a Petition for Writ of Certiorari to and including July 26, 1985. On June 3, 1985, Chief Justice Burger also signed an order extending the time for filing a

Petition for a Writ of Certiorari by the National Labor Relations Board to and including June 26, 1985, which was further extended to July 26, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, §7, 29 U.S.C. §157 (1982), provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, they shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §158(a)(3) of this Title.

National Labor Relations Act, §8(a)(1), 29 U.S.C. §158(a)(1) (1982), provides:

> It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain or coerce employees in the exercise of their rights guaranteed under §157 of this Title.

STATEMENT OF THE CASE

Statement of Facts

Kenneth Prill was hired on April 24, 1979 (App. 48), by Meyers Industries, a Michigan company engaged in the manufacture, sale and distribution of aluminum boats and related products. (App. 27,48) Prill had experience as an owner-operator truck driver for about four years before he went to work for Meyers. (App. 27) He was immediately assigned to drive what was known as the "red Ford truck" and its accompanying trailer, which he used to haul boats from Meyers' facility in Tecumseh, Michigan to dealers throughout the country.

(App. 27) Within a short time, Prill's equipment began to give him difficulty, particularly with the brakes and steering. (App. 48) Prill had made numerous complaints to his supervisor, Dave Faling, the company president, Alan Beatty, and the mechanic, Buck Maynard. (App. 49)

Maynard, on at least one occasion had attempted to correct these problems, but was unable because of the age of the vehicle. (App. 29,49)

On one trip to Xenia, Ohio, Prill stopped at an Ohio State roadside inspection station where the truck was cited for several defects, some relating to the brakes. (App. 29,50) These citations were forwarded to his supervisors at Meyers. (App. 29,50)

During June, 1979, another driver, Ben Gove, drove the red truck and claimed

to experience steering problems which nearly caused an accident. (App. 28,51) Gove reported these difficulties to Meyers' supervisors. (App. 28,51) Prill was present when Gove told Faling that he would not drive the truck again until it was repaired. (App. 28,51)

In July, 1979, while Prill was driving through Athens, Tennessee, he had an accident that was caused by the malfunctioning brakes. (App. 29,52). Prill called the Company's president, Alan Beatty, who instructed him to have a mechanic look at the equipment but to get it home as best he could. (App. 29,53) Prill did not return home with the trailer that night and instead called Beatty and Wayne Seagraves, another company supervisor, the next day. Both

were upset that Prill had not brought the truck back as directed. (App. 30,53)

After this conversation, Prill contacted the Tennessee Public Service Commission to arrange for an of icial inspection of the vehicle. (App. 20,54) As a result of that inspection a citation was issued putting the unit out of service because of bad brakes and damage to the hitch area. (App. 30,54)

At the same time, Meyers Industries sent Maynard, the mechanic, to Tennessee. Upon seeing the citation, he called Beatty, (App. 31) and together they decided to sell the trailer for scrap. (App. 31,56)

Two days later, Prill reported to work and was summoned to Seagraves' office, where he was questioned about the accident and the damage to the truck.

(App. 31,56) Specifically, he was questioned as to why he did not chain the trailer to the truck as he was directed, to which he responded that he did not consider the vehicle safe to drive. (App. 31,56)

At the end of this conversation, Prill was terminated because, in the words of Seagraves, "we can't have you calling the cops like this all the time." (App. 31,57)

Kenneth Prill then filed an unfair labor practice charge with the National Labor Relations Board claiming that Meyers Industries violated §8(a)(1) of the Act by discharging him because of his safety complaints and his refusal to drive an unsafe truck.

upon which to determine future claims of concerted activity, as follows:

> "In general, to find an employee's activities to be 'concerted' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity." (Citations omitted) (App. 34)

The Board went on to find that Prill's conduct, i.e. reporting the unsafe vehicle to transportation authorities and refusing to drive that vehicle, was not concerted activity within the meaning of the Act based upon the application of the "objective" standard.

In its review of the Board's decision, the Court of Appeals determined that the Board, in overruling Alleluia Cushion and establishing the "objective" standard, had failed to exercise its discretion as required by the Act because the Board claimed that its interpretation of "concerted activity" was mandated by the Act. (App. 81) Then, rather than rule on the issues presented, that is, whether the Board's interpretation of Section 7 was reasonable, and whether Prill's conduct was concerted and protected activity, the appellate court remanded the case to the Board for reconsideration of the scope of concerted activities under § 7 in light of NLRB v. City Disposal Systems, _____ U.S. _____, 104 S.Ct. 1505 (1984). (App. 117)

REASONS FOR GRANTING THE WRIT

The majority opinion of the Court of Appeals is in direct conflict with this Court's recent decision in NLRB v. City Disposal Systems, and misapplies the limitations on agency interpretation of law as set forth in SEC v. Chenery, Corp., 318 U.S. 80 (1943). Additionally, the practical result of the D.C. Circuit's decision is to undermine the Board's application of the Act by attempting to force the Board to adopt its interpretation of critical statutory language; that is, the phrase "concerted activities" in § 7 of the Act as it applies to employees not covered by a collective bargaining agreement.

On review of the Board's interpretation of "concerted activities," the

appellate court took the Board to task by criticizing its analysis of the statute, disagreeing with its discussion of Alleluia Cushion and its progeny, and disapproving the establishment of the new "objective standard." Yet, rather than determine whether the Board's interpretation of the Act was reasonable, the appellate court remanded the case to the Board holding that the Board did not apply the rule of City Disposal, and worse, did not properly exercise its discretion under the Act.

It is our position that the Board's decision was a proper exercise of its discretion under the Act; that the establishment of the "objective standard" was within that discretion; and, that

the appellate court erred by remanding the case under these circumstances.

I. The Opinion of the Court of Appeals is in Conflict with NLRB v. City Disposal Systems.

The centerpiece of the Board's decision was an extensive re-evaluation of the application of the phrase "concerted activities" in §7 of the Act. It included a review of the peripheral legislation, such as §2 of the Norris-LaGuardia Act (29 U.S.C. §102) and the law antecedent to the modern §7 NLRA. From this analysis the Board concluded that Section 7 cannot be interpreted in a manner that would permit a finding that a single employee, acting in his or her own interest, could be engaged in "concerted activities" when there is no collective bargaining agreement involved. The Board then established a standard reflecting this interpretation

which required the General Counsel, in future cases, to prove the existence of concerted activity rather than be permitted to rely on a presumption of implied concerted activity in cases where a single employee seeks to enforce the provisions of another statute for the benefit of all other employees.

Conversely, the majority of the Court of Appeals focused narrowly on the concluding paragraph to the Board's analysis which held:

> For all of the foregoing reasons, we are persuaded that the per se standard of concerted activity, by which the Board determines what ought to be of group concern and then artificially presumes that it is of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a

> particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.

From this statement the Court of Appeals concludes that the Board has failed to excercise its statutory discretion, as established by a long line of this Court's decisions, culminating in City Disposal, and for that reason has violated the principles relating to the agency's obligation to clarify the ground upon which its decision rests, as established in SEC v. Chenery.

The Court's majority relied on the Board's use of the phrase "This approach is mandated by the statute itself . . . " (App. 81), which it restates throughout the opinion in support of its position that the Board abdicated its statutory responsibility to exercise its discretion.

And, in support of this view relies on this Court's statements in NLRB v. City Disposal Systems that Section 7 of the Act does not require a narrow interpretation. (App. 85)

The Reversal of Alleluia Cushion was within the Board's Discretion.

In City Disposal this Court confirmed its position that "the task of defining the scope of Section 7 'is for the 8oard to perform in the first instance as it considers the wide variety of cases that come before it,' and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." City Disposal Systems, ____ U.S. ____, 104 S.Ct. at 1510. (Citations omitted) This Court has consistently held that "insofar as the Board aoplication of [the] meaning [of the

Act] engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review.'" NLRB v. Weingarten, Inc., 420 U.S. 251, 267 (1975). Moreover, this Court has maintained the view that "the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

This limited standard of review is not altered in cases where the Board overrules some of its prior decisions, for "an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit

in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to the administrative understanding of the statutes." NLRB v. Local 103, Iron Workers, 434 U.S. 335, 351 (1978).

Instead of determining whether or not the Board's interpretation of Section 7 was reasonably defensible, the Court of Appeals held that the Board did not perform its duty of defining the scope of Section 7 in the first instance, but rather abdicated this responsibility by adopting the view that the statute precluded the application of discretion and mandated a specific interpretation.

Yet a fair reading of the Board's decision, as reviewed by the dissent of Circuit Judge Bork, compels the conclusion that the decision to overrule Alleluia

Cushion and its progeny was not based on either a literal or narrow interpretation of the phrase "concerted activities", but on a careful analysis of the legislative history of Section 7, read in the context of the antecedent and parallel legislation. Moreover, the Board's position was taken only after careful analysis of Alleluia Cushion and its effects, especially in terms of the erosion of the burdens of proof, and with a clear appreciation of the need to balance the interests of employees, labor organizations, and management.

Perhaps the use of the word "mandated" was a poor choice of words, but it is clear from the Board's majority opinion that from its interpretation of Section 7 it was compelled to find that Congress had intended that "concerted activity," as applied to

non-collective bargaining situations, meant activity of two or more persons.

The Board's majority was careful to distinguish between its interpretation of the phrase "concerted activities" as it applies to persons acting in furtherance of a collective bargaining agreement and persons acting outside of the context of a bargaining agreement and distinguished this case from the Interboro doctrine , Interboro Contractors, Inc., 157 NLRB 1295 (1966), enf'd, 388 F.2d 495 (2nd Cir. 1967), which deals with "concerted activities" within the context of a collective bargaining agreement. This Court has also recognized the clear distinction between these two lines of cases in City Disposal ____ U.S.___, 104 S.Ct. at 1510, n. 6.

The gravamen of the D.C. Circuit's decision is that it simply disagrees with

the Board's approach to interpreting Section 7 and the standard of proof it adopted. As if to punctuate its dissatisfaction with the Board's interpretation, the Court of Appeals cites many different ways in which the Act can be interpreted, and criticizes the Board's analysis of the Act and prior Board decisions (App. 74) and the development of the Meyers standard of proof. All of which is criticism that goes to the question of the reasonableness of the Board's construction of the Act. Yet, instead of deciding the case on the "reasonableness" question as it should have, the majority, after thoroughly denouncing the Board's analysis, remands the case on the basis that the Board failed to exercise its discretion.

By taking this approach, the appellate court has, in effect, prohibited

the Board from effectuating its interpretation of the Act, even though the Board reviewed the Act in the context of its labor relations expertise and applied that interpretation to the situation after careful consideration. Although the appellate court argues that the Board did not properly apply City Disposal, that view ignores this Courts position that City Disposal only applies to a review of the Interboro doctrine, and that the Meyer's issue was clearly reserved for a future case. 104 S.Ct at 1510, N.6.

The D.C. Circuit should have reviewed the Board's decision solely to determine whether its interpretation was a reasonable construction of the Act. Its indirect refusal to do so, coupled with oblique disagreement with the Board's interpretation, brings its decision in direct

conflict with this Court's decisions in City Disposal and the other cases that have established the scope of the Board's discretion in implementing the Act.

II. The Scope of the Board's Authority to Interpret the Act is a Question of Immediate Importance.

The decisions of the NLRB have substantial and immediate impact on the major segment of commerce in this nation. The question of the Act's protection of employees is crucial to the every day expectations of both employees and employers. As this Court noted in City Disposal, "a single employee's invocation of such rights affects all the employees that are covered by the collective bargaining agreement." ____ U.S.____, 104 S. Ct. at 1510. Similarly, the Board's decision in

this case, and the Court of Appeals' misapplication of that decision, affects the Section 7 rights of all employees that do not work under collective bargaining agreements, a far greater group.

During the ten years since Alleluia Cushion the burden of proof in Section 8(a)(1) cases has evolved from the requirement to first prove whether group action occurred, and then whether that action was for a purpose of mutual aid and protection. See, e.g., Continental Manufacturing, 155 NLRB 255 (1965), (a case where the Board found no concerted activity based on an employee's letter to the company with a simple claim to represent the majority of the employees.), and the earlier case of Traylor-Pramco, 154 NLRB 380 (1965) (no concerted activity even though the two dischargees

were involved in the same conduct though not interrelated), to the more recent post-Alleluia Cushion modified burden to prove concerted activity by a simple showing that an independent employee acted in an area of general concern to working persons. Eventually, the burden of proof shifted to the respondent to submit evidence that other employees disavowed the activity. See, Krispy Kreme Doughnut Corp., 245 NLRB 1053 (1979), and the Fourth Circuit's criticism of that approach in its refusal to enforce the Board's order, Krispy Kreme Doughnut v. NLRB, 635 F.2d 304 (4th Cir. 1980).

The Board's current analysis of the Alleluia Cushion line of cases, in conjunction with its renewed examination of the applicable legislative history, compelled its conclusion that it was neces-

sary to re-establish the burdens of proof to the pre-Alleluia Cushion standards, and that its prior interpretation of the phrase "concerted activities" was at odds with the Act. (App. 24) These judgments are perfectly consistent with the agency's requirements to articulate the grounds upon which it acted when exercising its discretionary powers.

It is difficult to imagine a more precise articulation of the agency's reasons for reversing its prior holding in Alleluia Cusion. Although the result of that analysis may not be consistent with the D.C. Circuit's preferred result, it is nonetheless sufficiently clear to warrant the appellate court's review as to its reasonableness. See Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941). And, despite the majority's

claim that the Board failed to meet the requirements of SEC v. Chenery Corp., the particularity with which the Board established these grounds is perfectly consistent with the rule of that case. Moreover, it is evident from the Board's decision that, although reference was made to the Fourth Circuit's criticism of the Alleluia Cushion doctrine (App. 21), that criticism was not the basis of either the Board's analysis or its decision, but rather simply provided an example of the type of analytical problems that have been caused by the evolution of the Alleluia Cushion standards.

Thus, the Appellate Court's reliance on SEC v. Chenery Corp. as a basis upon hich to undermine the decision of the Board in Meyers is yet another misapplication of this Court's teachings, further weakening the Board's ability to perform

its statutory duty to interpret the Act in order to effectuate its purpose.

III. The Second Circuit Has Also Misapplied City Disposal

On July 19, 1985, the Second Circuit reversed the Board in Ewing v. NLRB, 141 Daily Labor Reporter (BNA) D-1, (2nd Cir. 84-1051, July 19, 1985), a case factually similar to Meyers, holding that the rationale of the D.C. Circuit leading to the reversal and remand of this case was correct.

The Second Circuit in Ewing, in the same manner as the D.C. Circuit in Meyers, construed this Court's decision in City Disposal to mean that the phrase "concerted activities" cannot be read literally under any circumstances. However, as discussed above, City Disposal was a limited review of the Board's

interpretation of "concerted activities" in a collective bargaining context, from which this Court concluded that a broad interpretation of "concerted activities" was not unreasonable. At the same time, this Court specifically recognized that City Disposal was distinguishable from Meyers because of the absence of a collective bargaining agreement in the latter case, and thus, reserved the non-collective bargaining question for the future.

Yet, at least two federal circuits, the District of Columbia and now the Second Circuit, have misapplied the reasoning of City Disposal by concluding that the Board cannot, in the proper exercise of its statutory discretion, interpret the Act as it did in Meyers by construing the words "concerted activities" literally. Moreover, because of

the refusal of these courts to examine the Meyers doctrine within their limited review powers, they have begun an unending ping pong game between the Board, on one hand, insisting upon a literal interpretation in non-collective bargaining cases, and the courts, on the other, refusing to accept that interpretation and reversing each case in an effort to impose their view on the agency.

Because of the high potential for this continuous but inconclusive activity between the courts and the agency, we maintain that the question regarding "concerted activities" in a non-collective bargaining area, reserved in City Disposal, is ripe for review in this case, not only because of the misconstruction of City Disposal by two circuits, but because the pattern of circuit court decisions is inhibiting the

agency from administering the Act, which in turn, creates an atmosphere of uncertainty for the vast majority of employers who operate in a non-collective bargaining context.

Conclusion

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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On Behalf of the
COUNCIL ON LABOR LAW EQUALITY
Attorney for Meyers Industries, Inc.

APPENDIX

Meyers Industries, Inc. and Kenneth P. Prill. Case 7-CA-17207

6 January 1984

DECISION AND ORDER

On January 14, 1981 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions with supporting briefs, after which the General Counsel filed a brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling,1/ findings,2/

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1 On 4 November 1980, after the hearing and before the judge's decision, the General Counsel, with the Charging Party's concurrence, moved to amend the complaint to include an additional allegation that the unlawful nature of Prill's discharge is supported by Sec. 502 of the National Labor Relations Act. The relevant portion of that section states:

1 Cont'd

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The judge, after considering the arguments of all parties, denied the General Counsel's motion by telegram of 11 November 1980. The General Counsel and the Charging Party cross-except. We note that counsel for the General Counsel engaged in lengthy argument at the hearing concerning the theory of her case both before as well as after the presentation of evidence, but gave no indication that Sec. 502 formed the basis for any portion of the General Counsel's case. In addition, although counsel for the Charging Party took the position at the hearing that Sec. 502 was applicable, counsel for the General Counsel thereafter reiterated that the theory of her case rested on Alleluia Cushion Co., 221 NLRB 999 (1975), and at no time adopted the Charging Party's position. Thus, although we agree with the judge that the General Counsel's motion to amend the complaint should be denied, we do so for the reason that the General Counsel neither raised nor litigated the Sec. 502 issue at the hearing. Accordingly, we affirm the judge's ruling and therefore do not reach the issue discussed in fn. 6 of the attached decision of whether Sec. 502 protects an employee in the circumstances of this case.

and conclusions only to the extent consistent with this Decision and Order.3/

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2 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the Judge's decision is the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in NLRB v. Pittsburg Steamship Co., 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." See generally Jack August Enterprises, 232 NLRB 881 (1977).

3 The Charging Party urges, as part of its cross-exceptions, that it be awarded a reasonable attorney's fee for this litigation. When a respondent's defense is dependent upon resolution of

Relying on Alleluia Cushion Co., 221 NLRB 999, the judge concluded that the Respondent violated Section 8(a)(1) of the Act when it discharged employee Kenneth P. Prill because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to the Tennessee Public Service Commission. Upon careful consideration, and for the reasons set forth below, we reject the principles the Board adopted in Alleluia, and do not agree with the view of protected concerted activity

3 Cont'd

credibility and hence is "debatable" rather than "frivolous," the Board has consistently refused to award litigation costs, even if the respondent has "engaged in 'clearly aggravated and pervasive misconduct,' or in the 'flagrant repetition of conduct previously found unlawful.'" Heck's Inc., 215 NLRB 765, 767 (1974); see also Tidee Products, 194 NLRB 1234 (1972). Upon a review of the record, we cannot say that the Respondent's defenses were frivolous. Accordingly, we deny the Charging Party's request for reasonable attorney's fees.

which that decision and its progeny advance. We, therefore, find that the Respondent did not violate Section 8(a)(1) by discharging Prill.

I. THE CONCEPT OF PROTECTED CONCERTED ACTIVITY

The concept of concerted action has its basis in Section 7 of the Act, which states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Although the legislative history of Section 7 does not specifically define "concerted activity," it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The immediate antecedent of Section 7 was Section 7(a) of the National Industrial Recovery Act of

1933,4/ the purpose of which was, as then Congressman Boland suggested, to "afford [the laboring person] the opportunity to associate freely with his fellow workers for the betterment of working conditions . . . [and it] primarily creates rights in organizations of workers."5/

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4 48 Stat. 195, 198.

See also § 2 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 102. The Supreme Court has stated that "Congress modeled the language of § 7 after that found in § 2 of the Norris-LaGuardia Act . . . which declares that it is the public policy of the United States that 'workers shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .'" Eastex, Inc. v. NLRB, 437 U.S. 556, 565 fn. 14 (1978).

5 79 Cong. Rec. H 2332 (daily ed. Feb. 20, 1935) (statement of Rep. Boland), reprinted in 2 Leg. Hist. of the National Labor relations Act of 1935, at 2431-32 (1935).

A review of the language of Section 7 leads to a similar united-action interpretation of "concerted activity." The wording of that section demonstrates that the statute envisions "concerted" action in terms of collective activity: the formation of or assistance to a group, or action as a representative on behalf of a group. Section 7 limits the employee rights it grants to the examples of concerted activities specifically enumerated therein--"self-organization"; forming, joining, or assisting labor organizations; and bargaining collectively through representatives--and to engaging in "other concerted activities

5 Cont'd

Boland's analysis of the "collectivist" antecedents of what became Sec. 7 of the Act was recognized by others. See, e.g., William H. Spencer, Collective Bargaining Under Section 7(a) of the National Industrial Recovery Act 3-6 (1935).

for the purpose of collective bargaining or other mutual aid or protection." (Emphasis added.) Thus, the statute requires that the activities in question be "concerted" before they can be "protected." Indeed, Section 7 does not use the term "protected concerted activities," "but only "concerted activities."6/

Consistent with this interpretation, the Board and courts before Alleluia generally analyzed the concept of protected concerted activity by first considering whether some kind of group

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6 The Act does not protect all concerted activity. It is not a violation of the Act to restrain or coerce an employee because he engages in concerted activity that is not protected--either, for example, because such activity contravenes another section of the Act or another statute, or because it was not engaged in "for the purpose of collective bargaining or other mutual aid or protection." See Eastex, 437 U.S. at 568 fn. 18. See generally Gregory, Unprotected Activity and the NLRA, 39 Va. L. Rev. 421 (1953).

action occurred and, only then, considering whether that action was for the purpose of mutual aid or protection.7/ In a 1951 case, Root-Carlin, Inc.,8/ the Board addressed the issue of what was required in order for activity to be "concerted." The case involved only conversation among employees about the need for a union in their workplace. The Root-Carlin Board stated:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization. [Emphasis added. 92 NLRB at 1314.]

Significantly, the Board described con-

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7 See, e.g., Texas Textile Mills, 58 NLRB 352 (1944); Lion Brand Mfg. Co., 55 NLRB 798 (1944, enfd. in relevant part 146 F.2d 773 (5th Cir. 1945); Globe Co., 54 NLRB 1 (1943); M.F.A. Milling Co., 26 NLRB 614 (1940), enfd. in relevant part 115 F.2d 140 (8th Cir.).

8 92 NLRB 1313 (1951).

certed activity in terms of interaction among employees.

Several years later, the Board again considered what constituted concerted activity in Traylor-Pamco.9/ That case involved the discharge of two men who consistently ate their lunch in the "dry shack" even during a concrete pour, while everyone else ate in the less pleasant surroundings of the tunnel so as to minimize "downtime." The trial examiner, with Board approval, declined to find the employees' refusal to eat in the tunnel to be concerted, stating: "There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the other in making his refusal, or that their association in refusing to eat in the tunnel was any-

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9 154 NLRB 380 (1965).

thing but accidental." 154 NLRB at 388. Thus, in Traylor-Pamco, the Board continued to define concerted activity in terms of employee interaction in support of a common goal.

Thereafter, the Board decided in Continental Mfg.,10/ in which employee Ramirez prepared and signed, on her own, a letter that she handed to respondent's owner. The letter stated that a majority of employees were disgusted by their treatment, that a supervisor played favorites, and that a janitor was needed for the women's bathroom. The letter concluded, "We all want to continue working here with you; please help us improve our working conditions." The Board reversed the trial examiner's finding that Ramirez' letter constituted concerted activity, stating:

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10 155 NLRB 255 (1965).

> The letter, which was directed only to the Respondent, was prepared and signed by Ramirez acting alone. She did not consult with . . . any other employee, or the Union about the grievances therein stated or her intention of sending the letter to DeSantis [an owner of respondent]. There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees. This letter received no support from union representatives . . . . [155 NLRB at 257.]

Once again, the Board defined concerted activity in terms of interaction among employees.11/

In recent years, but before Alleluia, the Board often decided the circumstances under which apparently individual activity may properly be characterized as "concerted." One of

11 The Board's analysis of the facts in Continental Mfg., which were similar to those in Alleluia, was directly contrary to the Alleluia Board's reasoning.

these cases, G. V. R., Inc.,12/ is factually indistinguishable from Alleluia, but equivocal in its reasoning. Glace and Curry were two employees who reported to the United States Army and the Department of Labor that their employer forced them to "kick back" portions of their wages. The judge found that Glace and Curry were discharged in violation of Section 8(a)(1) of the Act because they concertedly made complaints to the United States agencies about their wages, hours, and working conditions.13/ At footnote 2 of its decision, the Board majority noted:

> The Administrative Law Judge found, in substance, that even in the absence of a concerted activity, "Public policy would be frustrated

12 201 NLRB 147 (1973) (former Chairman Edward Miller dissenting).

13 The judge and the Board majority found evidence that Glace and Curry had actually acted in concert during the course of the investigation.

> if employees . . . could not, with full protection of the Act, make complaints to public agencies about wages, hours, etc., without fear of reprisals."

The Board majority specifically disavowed the judge's language, stating:

> We do not adopt this improper extension of our enunciated principle that it would be contrary to public policy to hold that the making of complaints to public authorities in the course of concerted activity removes the protection of the Act from the concerted activity. . . . [201 NLRB 147 at fn. 2.]

Despite the Board's rejection of the judge's extension of the concept of concerted activity, the Board majority stated:

> We also find, in addition to these reasons [the evidence of Glace's and Curry's actual concerted activities], that an employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's non-compliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's

> employees similarly situated. [Emphasis added. 201 NLRB at 147.]14/

Thus, with G. V. R., the Board apparently declined to extend its concept of concerted action as a matter of policy, but did so as a matter of law. The distinction is a difficult one to discern.

II. ALLELUIA, ITS PROGENY, AND THE DEVELOPMENT OF THE PER SE STANDARD OF CONCERTED ACTIVITY

With Alleulia, the transformed concept of concerted activity was at last revealed. In that case, maintenance employee Jack Henley registered safety complaints with respondent. Henley was later transferred to another facility,15/ where he encountered similar safety problems. Not satisfied with Alleluia's

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14 The "contract" referred to in the decision was not a collective-bargaining agreement, but a contract for services entered into between respondent and the United States Army.

15 The transfer was not at issue.

response to these problems, Henley wrote a letter of complaint to the California OSHA office (Occupational Safety and Health Administration), with a copy to the respondent. The Board found no evidence that, before complaining to respondent or writing to California OSHA Henley discussed the safety problems with other employees, sought their support in remedying the problems, or requested assistance in preparing the letter. Henley accompanied the OSHA inspector on a plant tour and was discharged the following day.

The judge dismissed the complaint in its entirety, finding no outward manifestation of group action. The Board disagreed and found concerted activity. The Board reasoned from the premise that "[s]afe working conditions are matters of great and continuing concern for all

within the work force." In support of that premise, the Board noted that both the Federal Government and the States had made known their concern with this area of industrial life through occupational safety and health legislation. The Board, therefore, reasoned that because Congress and the States made manifest the apparent national will in the area of industrial safety, "the consent and concert of action emanates from the mere assertion of such statutory rights."

Under the Alleluia approach, an observable manifestation of "group will" in the workplace (as distinguished from the legislature) was no longer required to find concert of action. The existence of relevant legislation and its invocation by a solitary employee became sufficient to find concerted activity. The practical effect of this change was to

transform concerted activity into a mirror image of itself. Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees ought to have a group concern. Stated another way, under the Alleluia analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, if then deemed the activity "concerted," without regard to its form. This is the essence of the per se standard of concerted activity. We emphasize that the Board, in Alleluia, presumed to divine the relevance of the safety issue to the "theoretical" employee group by pointing to the existence of legislation in the health

and safety area. Alleluia's progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided what ought to be the subject matter of working persons' concern when the statutory manifestation of such "group concern" was slim or nonexistent.16/

Another aspect of the Alleluia doctrine warrants scrutiny. Perhaps in an attempt to retain some element of the previous requirement of observable evidence of group support, the Board stated:

16 In Air Surrey Corp., 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979), and Pink Moody, Inc., 237 NLRB 39 (1978), Alleluia was expanded to include state banking statutes and motor vehicle laws, respectively.

In Steere Dairy, Inc., 237 NLRB 1350 (1978), and Ontario Knife Co., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir. 1980), the statutory element of Alleluia was not present, and individual conduct was deemd to be concerted solely on the theory that it involved a matter the Board considered to be of concern to the group.

> Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavoiw such representation, we will find an implied consent thereto and deem such activity to be concerted. [Emphasis added. 221 NLRB at 1000.]

This is yet another mirror image turn that the definition of concerted activity has taken. In the past, we required the General Counsel to prove support by other employees in order to find activity concerted. With Alleluia, the Board seemed to require a respondent to submit evidence that other employees disavowed the activity to prove that it was not concerted. This is a clear shift in the burden of proof, not countenanced by either the legislative history or judicial interpretation of Section 7.17/

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17 Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980).

The courts of appeals that have reviewed the post-Alleluia cases have rejected the per se standard of concerted activity.18/ In Krispy Kreme, the Fourth Circuit summarized the response of the courts as follows:

> The Board cites no circuit decision supporting its theory of presumed "concerted activity" in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7. [635 F.2d at 309.]

For all the foregoing reasons, we are persuaded that the per se standard of concerted activity, by which the Board determines what ought to be of group con-

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18 E.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

cern and then articifially presumes that it is of group concern, is at odds with the Ct. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.19/

19 Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), cited by the Board in Alleluia, is not to the contrary. That case involved a strike on board a ship moored in an American port. The strike, which was found to be in violation of the Federal mutiny statutes, would otherwise have been protected by the National Labor Relations Act. The Supreme Court resolved the conflict between the Act and the mutiny statutes by instructing the Board that it could not order the reinstatement of strikers who, under the circumstances, had engaged in a criminal

III. INTERBORO DISTINGUISHED FROM ALLELUIA

The Board's decision in Interboro Contractors 20/ holds that actions an individual takes in attempting to enforce a provision of an existing collective-bargaining agreement are, in effect, grievances within the framework of that agreement.21/ It is not our intention

19 Cont'd

act. In short, the Board was required to accommodate its own mandates to those of another statutory scheme. Such accommodation, we emphasize, had the effect of narrowing the scope of the National Labor Relations Act. The "accommodation" the Alleluia decision compelled, however, involved nothing less than using other statutes to create rights that do not exist under the act.

20 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

21 The issue of the validity of the Interboro doctrine is presently pending before the Supreme Court. City Disposal Systems, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), cert. granted 51 U.S.L.W. 3703 (U.S. Mar. 28, 1983) (No. 82-960).

to set forth the parameters of Interboro in this case, but rather to distinguish Interboro from Alleluia.

The focal point in Interboro was, and must be, the attempted implementation of a collective-bargaining agreement. By contrast, in the Alleluia situation, there is no bargaining agreement, much less any attempt to enforce one, and we distinguish the two cases on that basis.

IV. DEFINITION OF CONCERTED ACTIVITY

Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity--the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Alleluia and its progeny.

Although the definition of concerted activity we set forth below is an attempt at a comprehensive one, we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law. In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other emloyees, and not solely by and on behalf of the employee himself.22/ Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., dis-

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22 See Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980); Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966).

charge) was motivated by the employee's protected concerted activity. 23/

We emphasize that our return to a pre-Alleluia standard of concerted activity places on the General Counsel the burden of proving the elements of a violation as set forth herein. It will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theore-

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23 See Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in NLRB v. Transportation Managment Corp., 103 S. Ct. 2496, 97 LC ¶10,164 (1983).

Under this standard, an employee "may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." NLRB v. Condenser Corp. of America, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like NLRB v. Burnup & Sims, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

tical group and expect to establish concert of action thereby.

We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence. It is, therefore, imperative that the parties present as full and complete a record as possible.

V. APPLICATION OF THE DEFINITION OF CONCERTED ACTIVITY TO THE FACTS OF THE INSTANT CASE.

As the judge found, Charging Party Kenneth P. Prill drove trucks for a number of years and was an owner-operator for the 4 years before his employment by the Respondent. The Respondent assigned Prill to drive what was described as the "red Ford truck" and its accompanying trailer, with which he hauled boats from

the Respondent's facility in Tecumseh, Michigan, to dealers throughout the country. Prill's equipment, particularly the brakes and steering, gave him difficulty on a number of occasions, and he often lodged complaints with the Respondent concerning malfunctions.

Although the red Ford truck and trailer were assigned to Prill on what might fairly be described as a permanent basis, during the first 2 weeks of June 1979 Prill's fellow employee, Ben Gove, was assigned that equipment while Prill was absent from work. On a trip to Sudberry, Ontario, Gove experienced steering problems which nearly caused an accident. On Gove's return, he informed Supervisor Dave Faling of difficulties with the truck. Prill who had by then returned to work, was also in Faling's office to receive paperwork for an

upcoming trip. Prill was present when Gove told Faling that he "wouldn't take the truck as far as Clinton and back, until they had done some repair on it. I [Gove] didn't care who done it, but I wasn't going to drive it no farther."

The Respondent's mechanic, Buck Maynard, made an unsuccessful attempt to correct the problems. Thereafter, on a trip to Xenia, Ohio, during which the brakes malfunctioned, Prill voluntarily stopped at an Ohio State roadside inspection station where the trailer was cited for several defects, some relating to the brakes. Prill forwarded the citation to the Respondent's officials.

In July 1979, while driving through Tennessee, Prill was involved in an accident caused by the malfunctioning brakes. Prill telephoned the Respondent's president, Alan Beatty, who instructed Prill to have a mechanic look

at the equipment, but to get it home as best he could. The following morning Prill again called Beatty. The Respondent's vice president, Wayne Seagraves, joined the conversation on an extension telephone. Both Beatty and Seagraves were upset with Prill for not having left Tennessee, and a decision was made to send Maynard to Tennessee to examine the equipment.

Thereafter, Prill, of his own volition, contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The following morning a citation was issued, and the unit was put out of service due to bad trailer brakes and damages to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibits the unsafe

operation of a vehicle. A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved.

When Maynard arrived in Tennessee, Prill showed him the citation. Maynard called Beatty, and it was decided to sell the trailer for scrap. Prill then drove the truck back to Tecumseh.

The judge found that when Prill reported in on 5 July 1979 he turned in his paperwork and was summoned to Seagraves' office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because "we can't have you calling the cops like this all

the time." Beatty, who had entered the office during the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

The judge concluded that Prill was discharged for two reasons: (1) his refusal to drive an unsafe vehicle after filing the report with the Tennessee Public Service Commission, and (2) his earlier safety complaints, including a complaint to Ohio authorities. The judge held that Prill's discharge was unlawful, relying on Alleluia, which he noted, "established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees." (Decision of the adminis-

trative law judge, sec. II,B, par. 2.)24/ The judge further noted in support of his Alleluia analysis that Prill's refusal to drive the equipment was mandated by Department of Transportation regulations, which require that an inspection be made after an accident to determine the extent of damage, and also that a vehicle cited as unsafe not be operated until it is repaired.25/

The judge found that Prill, by contacting local authorities and refusing to drive the vehicle, was enforcing the cited provisions of the national transportation policy, and that his invoking the Tennessee Public Service Commission's

24 The judge additionally relied on Ontario Knife Co., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir.); Steere Dairy, 237 NLRB 1350 (1978); and Pink Moody, Inc., 237 NLRB 39 (1978).

25 Citing Federal Motor Carrier Safety Regulations, 49 C.F.R. § 396.4.

inspection apparatus was the legal equivalent of a safety complaint to OSHA. See Alleluia. The judge concluded his analysis by stating that the Respondent was "free, under Alleluia Cushion, to rebut the inference that Prill's activity inured to the benefit of all employees. It could have been shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a super sensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This Respondent failed utterly to accomplish." (ALJD, sec. II,B, par. 10.)

Rejecting, as we do, the judge's reliance on Alleluia we find that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Prill for refusing to drive his truck and

trailer and for contacting state authorities. Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf. It follows that, without the artificial presumption Alleluia created, the facts of this case do not support a finding that Prill engaged in concerted activity.

There is one other point that warrants consideration. The judge stated that "Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks."

(ALJD, sec. II,B, par. 8.) It is not certain whether the judge cited this evidence in support of his Alleluia analysis, or in support of an alternative pre-Alleluia rationale. To the extent that the judge appears to have concluded that this record evidence would lead to a finding of concerted action under a pre-Alleluia analysis, we reject his conclusion.

The record is clear that Prill merely overheard Gove's complaint while in the office on another matter, and there is no evidence that anything else occurred. The record reflects, and the judge found, only that Prill stood by when Gove made his complaint; the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition. Indeed, the most that can be inferred

from this scenario is that another employee was individually concerned, and individually complained, about the truck's condition. Taken by itself, however, individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action.

In this regard, the Alleluia presumption has only engendered analytical confusion. Thus, under Alleluia, concern is presumed unless otherwise rebutted; to affirmatively show that another employee is individually concerned, or even lodges a complaint, adds not one whit to an Alleluia analysis. Yet, evidence of individual concern by more than one employee has come to be viewed as evidence of concert itself, and has so blurred the distinction between the two types of evi-

dence that the Board has lost sight of what is required of a pre-Alleluia analysis.

In its pre-Alleluia days the Board had, in fact, considered factual patterns similar to that presented herein and had declined to find concerted activity. See, e.g., Traylor-Pamco and Continental Mfg., discussed above. As with the employees who ate their lunch together in Traylor-Pamco, there is no evidence here that there was any concerted plan of action between Gove and Prill, or that either relied in any measure on the other when each refused to drive the truck. In addition, as in Continental Mfg., there is no support for a finding that either Gove's or Prill's refusal was intended to enlist the support of other employees. Prill's refusal to drive the truck and trailer and his report to the Tennessee

Public Service Commission were made by himself and for himself alone, and thus cannot be deemed concerted.

One might nonetheless fairly argue that Prill's situation is a sympathetic one that should cause us concern. We do not believe, however, that Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here. Although it might be argued that a solitary over-the-road truckdriver would be hard pressed to enlist the support of co-workers while away from the home terminal, the Board, to paraphrase former Chairman Edward Miller's dissent in G. V. R., is neither God nor the Department of Transportation. Outraged though we may be by a respondent who--at the

expense of its driver and others traveling on the nation's highways--was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

In conclusion, we acknowledge that there are few areas of the law that are entirely free of uncertainty or disagreement. We are persuaded, however, that Alleluia and its progeny have been an unfortunate deviation from the objectives and purposes of the Act, as defined by its legislative and judicial history, and it will not serve us well, nor those whom we are charged to protect, to continue to adhere to Alleluia's precepts.

Accordingly, based on all the foregoing reasons, and the record as a whole, we shall dismiss the complaint.

ORDER

Complaint dismissed. Member Zimmerman dissented. Dissent not reproduced as it is not germaine to this case.

PRILL v. NLRB

(Meyers Industries, Inc.)

U.S. Court of Appeals,
District of Columbia Circuit

Petition for review of an order of the NLRB (115 LRRM 1025, 268 NLRB No. 73). Remanded.

Ellis Boal, for petitioner.

David Fleischer (Wilford W. Johansen, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with him on brief), for respondent.

Ira Jay Katz, filed brief for Workers' Rights Law Project, et al., amici curiae, urging reversal.

Before WALD, EDWARDS, and BORK, Circuit Judges.

Full Text of Opinion

EDWARDS, Circuit Judge: -

I. Prologue

On this petition for review, we consider a case in which the petitioner, Kenneth Prill, was discharged from his job at Meyers Industries, Inc. ("Meyers"), because he complained about the unsafe condition of a company truck and trailer, including a complaint to state authorities following an accident, and because he refused, for safety reasons, to continue driving the truck and trailer following the accident. An investigation by state officials determined that the company vehicle was in fact unsafe due to faulty brakes and a damaged hitch, and a citation was issued against Meyers. Notwithstanding the concededly unsafe condition of the vehicle, Prill was fired because company officials decided that they could not have him "calling the cops all the time."

In protest against his discharge, Prill filed an unfair labor practice

charge with the National Labor Relations Board ("NLRB" or "Board"), and a complaint was issued against Meyers. An Administrative Law Judge ("ALJ") following existing Board precedent found that Prill's conduct constituted "concerted activit[y] for ... mutual aid or protection" under section 7 of the National Labor Relations Act ("NLRA" or "Act"),[1] and recommended his full reinstatement. However, the Board, over the dissent of one member, reversed the decision of the ALJ, overruled its earlier decisions, and dismissed the complaint

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1 § 7, 29 U.S.C. § 157 (1982) provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organiza-

against Meyers.[2] In rejecting Prill's charge, the Board adopted a new definition of "concerted activities," under the enunciated test, an employee's conduct is not "concerted" unless it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] Finding that Prill had acted alone and "solely on his own behalf,"[4] the Board held his conduct unprotected by section 7.

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1 Cont'd.

tion as a condition of employment as authorized in section 158(a)(3) of this title.
Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1982) provides:

It shall be an unfair labor practice for an employer -
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

2 Meyers Indus., Inc. 268 NLRB No. 73, 115 LRRM 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers").

3 Id. at 12, 115 LRRM at 1029.

4 Id. at 16, 115 LRRM at 1030.

[1] It is not the responsibility of the courts to second-guess the lawful judgments of the NLRB. The Board has been granted broad authority to construe the NLRA in light of its expertise. In appropriate circumstances, the Board even may elect to abandon or modify established precedent. However, judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.

In the instant case, we find that the Board erred when it decided that its new definition of "concerted activities" was mandated by the NLRA. Because the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale. Accordingly, we remand this case under

the principles of SEC v. Chenery Corp.,[5] so that the Board may reconsider the scope of "concerted activities" under section 7. We express no opinion as to the correct test of "concerted activities," we require only that the Board exercise the full measure of administrative discretion granted to it by Congress and reconsider this matter free from its erroneous conception of the bounds of the law.

II. BACKGROUND

A. Facts

The facts were found by the Administrative Law Judge[6] and accepted by the Board,[7] and are largely undisputed on

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5 318 U.S. 80 (1943).

6 Meyers Indus., Inc., Case 7-CA-17207, slip op. at 2-65 (Jan. 14, 1981) reprinted in Joint Appendix ("J.A.") 280, 281-84 (hereinafter referred to as "ALJ Decision").

7 Meyers at 1-2, 13-15, 115 LRRM at 1029-30.

review. Kenneth Prill was hired as a skilled driver on April 24, 1979, by Meyers Industries, a Michigan company engaged in the manufacture, sale and distribution of aluminum boats and related products. Prill had driven trucks for several years before going to work for Meyers, and he had received two years of training as a mechanic. Throughout the period that he was employed by Meyers, he had a good work record.

Prill was assigned to drive a red Ford truck and its accompanying trailer to haul boats from Meyers' main facility in Tecumseh, Michigan, to dealers throughout the country. Prill soon began to experience problems with his equipment, especially with the steering and the trailer's brakes.[8] In addition to discussing these

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8 As Prill explained in his testimony before the ALJ, his vehicle was equipped with braking systems on both the truck and the trailer components. These

problems with other drivers,[9] Prill made numerous complaints to his supervisor, Dave Faling, to the company president, Alan Beatty, and to the mechanic, Buck Maynard, after returning from trips on which the brakes malfunctioned.

On one trip, for example, while he was driving through Chicago, Illinois, Prill narrowly escaped an accident when his brakes failed during a sudden stop in heavy traffic. On his return Prill asked Faling and Maynard to have the brakes repaired, but Maynard's efforts were unsuccessful.

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8 Cont'd

systems, although they can be operated independently, ordinarily would function together when the brake pedal is depressed. On the vehicle assigned to Prill, however, the brakes on the trailer were essentially inoperative. See Transcript of Hearing (Aug. 1, 1980) ("Tr.") at 16-17, J.A. 40-41.

9 See Tr. at 18, J.A. 42.

He told Prill that the axles were so old that it was impossible to secure replacement parts; Prill insisted that new parts be purchased. After his next trip, during which the brakes remained inoperative, Prill again asked Faling when the brakes would be repaired, but was simply referred to Maynard or Beatty.

On a subsequent trip to Xenia, Ohio, Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. As a result of that inspection, the truck was issued a citation for a number of defects, including the brakes. When Prill returned to Michigan, he showed the citation to Faling and submitted it together with his post-trip paperwork.

During the first two weeks in June, 1979, another driver, Ben Gove, drove Prill's equipment on a trip to Sudberry,

Ontario. Gove testified before the ALJ that he experienced a steering problem which made it difficult to hold the road and "caused [the truck] to swerve back and forth like Ken Prill described," nearly causing an accident.[10] When Gove went to Faling's office to submit his post-trip report, Prill was there at the same time to receive paperwork for the next trip. Gove described the steering and brake problems to Faling, and stated, in Prill's presence, that he would not drive the truck again until it was repaired.[11] Faling promised

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10 Tr. at 62, J.A. 86.

11 Gove testified at the hearing that he told Faling, "I wouldn't take the truck as far as Clinton and back, until ... someone reapired [sic] it. I didn't care who done it, but I wasn't going to drive it no further." Tr. at 63, J.A. 87. In its brief, the Board reads this statement to mean that Gove did not care who drove the truck. Brief for NLRB at 3. We agree with the petitioner. Reply Brief of Petitioner at 1-2, that the more natural reading of Gove's statement is that he did not care who repaired the truck so long as repairs were made.

to make the needed repairs.

In early July, Prill was driving through Athens, Tennessee, when he had an accident which the Board found was caused by the malfunctioning brakes.[12] A pickup truck struck the left rear of Prill's trailer, causing the truck to jack-knife and sending both vehicles into a ditch.[13] After giving a statement to the state highway patrol at the scene of the accident, Prill unsuccessfully sought to have the truck and trailer inspected by the state public service commission.[14]

Following the accident, Prill called Meyers' president Alan Beatty at home to

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12 Meyers at 14, 115 LRRM at 1029.

13 Meyers conceded before the agency that the accident was not Prill's fault and that it was not a consideration in his discharge. ALJ Decision at 3, J.A. 282.

14 Tr. at 34-35, J.A. 58-59.

advise him of the incident and of the extensive damage to the unit. Beatty asked Prill to chain the tractor and trailer together and tow the trailer back to Tecumseh for repairs. Prill responded that "It would be possible to do that, but it would still be a hazard on the highway" because the hitch area was cracked and might give way and cause an accident.[15] Beatty repeated that Prill should chain and tow the trailer home, but told him that if he insisted he could have a mechanic in Tennessee look at it.

The following morning, Prill called Beatty at work and spoke to him and to Warren Seagraves, the company's vice president for production. Both were upset that Prill was still in Tennessee, and demanded to know why he had not yet left. Prill stated that the vehicle was unsafe

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15 Tr. at 36, J.A. 60.

because the hitch was damaged and the trailer lacked brakes. Seagraves responded that the company had been running its trucks like that for 20 years.[16] At the end of the conversation, Beatty and Seagraves decided to send Maynard down to check the equipment.

After this conversation, Prill decided to contact the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The inspection resulted in a citation putting the unit out of service because of bad brakes and damage to the hitch area. The citation was based on several Department of Transportation regulations, including 49 C.F.R., § 396.4, which prohibited the

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16 Tr. at 37, J.A. 61.

operation of an unsafe vehicle.[17] Prill was instructed to notify the police or Public Service Commission immediately if anyone attempted to move the vehicle before required repairs were made. When

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17 49 C.F.R. § 396.4.(1978), the regulation in effect at the time of the events herein, provided as follows:

> Unsafe operations forbidden.
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> No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.

Maynard arrived in Tennessee later the same day, Prill showed him the citation. Maynard and Beatty then decided that the trailer was not worth repairing and should be sold for scrap after removing the tires.

Two days later Prill reported for work and was summoned to Warren Seagraves' office, where he was questioned about the accident and damage to the truck. Both Seagraves and Beatty asked Prill why he had not towed the trailer back as requested; Prill responded that this would have been both unsafe and unlawful."[18] At the

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18 Prill testified that he told Seagraves "that the law requires that all vehicles that are involved in an accident be inspected by either a state authority or a certified mechanic of somekind [sic] before they are moved or put back on the highway again." Tr. at 54, J.A. 78. Prill testified that in this conversation he was relying on § 396.6 of the Federal Motor Carrier Safety Regulations, which were contained in a manual for truck drivers published by

end of the conversation, Seagraves told Prill that he was discharged because "we can't have you calling the cops like this all the time."[19]

B. The Decisions of the ALJ and the Board

On the basis of these facts, the ALJ found that Prill was discharged because of his safety complaints and his refusal to drive an unsafe vehicle in accordance

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18 Cont'd.

the Federal Highway Administration, U.S. Department of Transportation. The section provided as follows:

> Damaged vehicles, inspection.
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> No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition. 49 C.F.R. § 396.6 (1978).

19 Tr. at 44, J.A. 68.

with Department of Transportation regulations.[20] Relying on the rationale of Alleluia Cushion Co.,[21] the ALJ held that Prill's actions were "concerted activities for ... mutual aid or protection" under section 7 of the NLRA, and thus protected, because they inured to the benefit of all employees.[22] In order to understand this conclusion, it is necessary briefly to review the development of the Board's doctrine of "constructive concerted activity.

During the past 25 years, the Board has gradually extended the concept of "concerted activities" under section 7 to include certain types of actions taken by individual employees. For example, under the so-called Interboro doctrine, the

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20 ALJ Decision at 8-9, J.A. 287-88.

21 221 NLRB 999, 91 LRRM 1131 (1975).

22 ALJ Decision at 9-10, J.A. 288-90.

Board has long held that the assertion by a single employee of rights derived from a collective bargaining agreement is protected under section 7, on the reasoning that such an act is an extension of the concerted action that produced the agreement and that it affects the rights of all employees covered by the agreement.[23] In addition, in a series of cases since 1959, the Board developed the position that section 7 protects complaints made by an individual, even absent authorization by other employees, "if the matter at issue is of moment to the group of employees complaining and if that matter is brought to the attention of management by a spokesman,

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23 See Interboro Contractors, Inc., 157 NLRB 1295, 1298, 61 LRRM 1537 (1966), enforced, 388 F.2d 495, 67 LRRM 2083 (2d Cir. 1967); Bunney Bros. Constr. Co., 139 NLRB 1516, 1519, 51 LRRM 1532 (1962).

voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group."[24]

In Alleluia Cushion Co.,[25] the Board extended the doctrine of constructive concerted activity to include an individual employee's efforts to invoke state and federal laws regulating occupational safety. In Alleluia an employee was discharged for notifying the California Occupational Safety and Health Administration (OSHA) of unsafe conditions at his plant. Observing that "[s]afe working

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24 Carbet Corp., 191 NLRB 892, 892, 77 LRRM 1722 (1971); Hugh H. Wilson Corp., 171 NLRB 1040, 1046, 69 LRRM 1264 (1968), enforced, 414 F.2d 1345, 71 LRRM 2827 (3d Cir. 1969), cert. denied, 397 U.S. 935, 73 LRRM 2600 (1970); Guernsey-Muskingum Elec. Coop., Inc., 124 NLRB 618, 624, 44 LRRM 1439 (1959), enforced, 285 F.2d 8, 47 LRRM 2260 (6th Cir. 1960).

25 221 NLRB 999, 91 LRRM 1131 (1975).

conditions are matters of great and continuing concern for all within the workforce," and that filing the OSHA complaint "was an action taken in furtherance of guaranteeing Respondent's employees their rights under the California Occupational Safety and Health Act," the Board held that

[i]t would be incongruous with the public policy enunciated in such occupational safety legislation ... to presume that, absent on outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees has been legislatively declared to be in the overall public interest, the consent and

concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to concerted.[26] The rationale of Alleluia thus was composed of two stands: (1) the Board's familiar view that an individual's activity should be protected if it relates to a matter of "mutual concern" to employees , and (2) a more specific rationale that concert may be presumed when an individual asserts rights under a statute enacted

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26 Id. at 1000.

for the benefit of employees.[27]

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27 See Meyers at 20-21, 115 LRRM at 1031-32 (Member Zimmerman, dissenting); Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa.L. Rev. 286, 305 (1981).

In later cases, the Board extended the reasoning of Alleluia to protect the assertion of rights under other statues, as well to complaints over matters of mutual concern and to employee complaints made to the employer rather than to governmental agencies. See, e.g., Krispy Kreme Doughnut Corp., 245 NLRB 1053, 102 LRRM 1492 (1979), enforcement denied, 635 F.2d 304, 105 LRRM 3407 (4th Cir. 1980) (worker's compensation claim); Steere Dairy, Inc., 237 NLRB 1350, 99 LRRM 1434 (1978) (protest over pay and working conditions); Self Cycle & Marine Distrib. Co., 237 NLRB 75, 98 LRRM 1517 (1978) (unemployment compensation claim); Air Surrey Corp., 229 NLRB 1064, 95 LRRM 1212 (1977), enforcement denied, 601 F.2d 256, 102 LRRM 2599 (6th Cir. 1979) (inquiry concerning employer's ability to meet payroll); Dawson Cabinet Co., 228 NLRB 290, 96 LRRM 1373, enforcement denied, 566 F.2d 1079, 97 LRRM 2075 (8th Cir. 1977) (protest over failure to comply with Equal Pay Act).

While the Alleluia decision itself did not receive judicial review, the post-Alleluia decisions were generally rejected by the courts of appeals.

Applying the principles of Alleluia and its progeny,[28] the ALJ in the instant case held Prill's conduct protected under section 7. He reasoned that Prill's refusal to drive the vehicle was mandated by Department of Transportation regula-

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27 Cont'd.

See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (2d Cir. 1980); Krispy Kreme, supra; Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238, 103 LRRM 3008 (9th Cir. 1980); Dawson Cabinet Co., supra. But see, e.g., NLRB v. Lloyd A. Fry Roofing Co., 651 F2d 442, 107 LRRM 2926 (6th Cir. 1981); NLRB v. Ambulance Serv. of New Bedford, Inc., 564 F.2d 88,97 LRRM 2110 (1st Cir.), enforcing mem. 229 NLRB 106, 95 LRRM 1239 (1977); see also NLRB v. Parr Lance Ambulance Serv., 723 F2d 575, 579-80, 115 LRRM 2193 (7th Cir. 1983). We discuss below, see note 72 infra, the relevance of these decisions to the instant case.

28 In particular, the ALJ relied on Pink Moody, Inc., 237 NLRB 39, 98 LRRM 1463 (1978), in which the Board found a violation of section 8(a)(1) on facts nearly identical to those in Meyers.

tions that reflected a concern for the safety of particular drivers as well as for that of the general public, and that "[a]n employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck."[29] The ALJ also held that Prill's complaints prior to the accident "were clearly concerted because they were joined by driver Gove," who had made similar complaints to supervisor Dave Faling in Prill's presence.[30] Therefore, the ALJ ruled that Prill's discharge violated section 8(a)(1).

The Board disagreed and dismissed the complaint. Overruling Alleluia and its progeny, the Board argued that activity could be "concerted" only if it in fact

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29 ALJ Decision at 9-10, J.A. 288-89.

30 Id. at 10, J.A. 289.

involved "some kind of group action," and criticized Alleluia as inconsistent with the statute because it allowed group support to be presumed rather than proven.[31] Claiming to return to "the standard on which the Board and courts relied before Alleluia,"[32] the Board announced the following test for protected concerted activity:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. Once the activity is found to be concerted, an (a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity,

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31 Meyers at 3, 8-10, 115 LRRM at 1026, 1027-28.

32 Id. at 11, 115 LRRM at 1029.

the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[33]

Applying this standard, the Board held that Prill had acted alone and "solely on his own behalf" when he refused to drive the truck and contacted the Tennessee Public Service Commission.[34] As to whether Prill's complaints prior to the accident were joined by Gove, the Board found that the record was clear that "Prill merely overheard Gove's complaint while in the office on another matter."[35] Stating that "the most that can be inferred from this scenario is that another employee was individually concerned ... about the

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33 Id. at 12, 115 LRRM at 1029 (footnotes omitted).

34 Id. at 16, 115 LRRM at 1030.

35 Id.

truck's condition," the Board ruled that "[t]aken by itself, ... individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."[36] Although the Board admitted to being "[o]utraged ... by a respondent who - at the expense of its driver and others traveling on the nation's highways - was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost," it nevertheless concluded that it did not believe "that section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of

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36 Id. at 17, 115 LRRM at 1030 (emphasis in original.

individual activity presented here."[37] Therefore, the Board held that Prill's discharge did not violate his rights under section 7.[38]

III. ANALYSIS

A. Standard of Review

Because the Board is entrusted with the "responsibility to adapt the Act of changing patterns of industrial life,"[39]

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37 Id. at 18, 115 LRRM at 1031. The Board added, paraphrasing Chairman Miller's-dissent in G.V.R., Inc., 201 NLRB 147, 148, 82 LRRM 1139 (1973), that it was "neither God nor the Department of Transportation," and that it was "not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws." Meyers at 18, 115 LRRM at 1031.

38 One member of the Board dissented, arguing that the Board's "use [of] the concept of concerted activity to cut off protection for the individual employee who asserts collective rights" violated "the history and spirit of Federal labor laws." Id. at 20, 115 LRRM at 1031 (Member Zimmerman, dissenting).

39 NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 88 LRRM 2689 (1975).

a reasonable construction of the Act by the Board is entitled to considerable deference.[40] An agency decision cannot be sustained, however, where it is based not on the agency's own judgment but on an erroneous view of the law. For it is a fundamental principle of law that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[41] As the Supreme Court stated in its landmark decision in SEC v. Chenery Corp.:

[I]f [agency] action is based upon a determination of law as to which the reviewing authority of the courts does

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40 See, e.g., NLRB v. City Disposal Sys., Inc., 104 S.Ct. 1505, 1510, 115 LRRM 3193 (1984); Ford Motor Co. v. NLRB, 441 U.S. 488, 495, 101 LRRM 2222 (1979).

41 SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("Chenery"); see also SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

come into play, an order may not stand if the agency has misconceived the law .... [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.[42]

These principles were concisely stated by Judge Bork in his separate opinion in Planned Parenthood Federation of America, Inc. v. Heckler:[43]

Under SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we must judge the validity of an administrative regulation solely on "the grounds upon which the [agency] itself based its action." Id. at 88, 63 S.Ct. at 459. In particular, an agency regulation must

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42 318 U.S. at 94.

43 712 F.2d 650 (D.C. Cir. 1983).

be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it "was not based on the [agency's] own judgment but rather on the unjustified assumption tht it was Congress' judgment that such [a regulation is] desirable." FCC v. RCA Communications, Inc., 346 U.S. 86, 96, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953). If a regulation is based on an incorrect view of applicable law, the regulation cannot stand as promulgated, unless the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." Massachusetts Trustees v. United States, 377 U.S. 235, 248, 84 S.Ct. 1236, 1245, 12 L.Ed.2d 268 (1964).[44]

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44 Id. at 666 (Bork, J., concurring in part and dissenting in part); see also FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); White v. United states

We think that the teachings of Chenery are plainly implicated in this case. The Board's opinion clearly reveals that it considered its adoption of a narrow test for "concerted activities" both to be mandated by the NLRA itself and to be merely a return to "the standard on which the Board and courts relied before Alleluia."[45] We believe that the Board misinterpreted the law in two respects. First, we think, especially on the basis of recent Supreme Court decisions, that the Board erred in assuming that the NLRA mandates its present interpretation of "concerted activities." In other

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44 Cont'd.

Dep't of the Army, 720 F.2d 209, 210-11 (D.C. Cir. 1983); The Diplomat Lakewood Inc. v. Harris, 613 F.2d 1009, 1018-19 (D.C. Cir. 1979). See generally Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199.

45 Meyers at 11, 115 LRRM at 1029.

words, the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe "concerted activities" except as indicated in the Meyers test.[46] Second, contrary to the view expressed by the Board, we find that the Meyers test does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard. We therefore conclude that, because the Board's decision stands on a faulty legal premise and without adequate rational, we must remand the case for reconsideration.

B. The Meyers Test

The Board announced in this case that, "[i]n general, to find an employee's activity to be 'concerted,' we shall

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46 We express no view on whether, under § 7, the Board may adopt the Meyers test as an exercise of discretion.

require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[47] As counsel for the Board confirmed at oral argument, this test in effect requires that two or more employees join in or authorize conduct before activity can be "concerted" under section 7.

The Board's decisions since Meyers indicate that the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees. Thus, to find that a complaint by an individual employee was made "on behalf of" others, the Board in effect will require that the complaint have been specifically authorized by other

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47 Meyers at 12, 115 LRRM at 1029.

employees.[48] Further, a single employee who files a complaint with a

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48 See, e.g., Mannington Mills, Inc., 272 NLRB No. 15, 117 LRRM 1233 (Sept. 21, 1984); see also Allied Erecting & Dismantling Co., 270 NLRB No. 48, 116 LRRM 1076 (April 30, 1984). In Mannington Mills, the employee, William Frie, was a crew leader in the respondent's shipping department, as well as the elected representative of that department's employees to the company's safety committee, a joint management-employee forum for both safety and nonsafety complaints. Shipping department employees had a "long-standing complaint" about the employer's practice of requiring the night-shift crews to perform loading operations left unfinished by the previous shift. In July 1980, Frie, "acting in his capacity as employee representative," raised this complaint with the safety committee and was told to take it up with the night-shift foreman. In October, he discussed the matter with foreman and stated that the night-shift employees would refuse to perform such assignments in the future. Upholding Frie's discharge, the Board stated that, even accepting Frie's testimony that a number of other employees had indicated to him that they would refuse to perform the work, nothing in the record showed that they had authorized him to make such a threat to the

state agency will not be held to have engaged in concerted activities, regardless of how clearly his concern is shared by other employees.[49]

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48 Cont'd

employer. Thus, the Board concluded that, under Meyers, Frie's threat constituted individual rather than concerted activity.

49 In Jefferson Elec. Co., 271 NLRB No. 177, 117 LRRM 1092 (Aug. 21, 1984), a group of workers was exposed to noxious fumes from a production process as a result of a clogged air vent. Some employees complained to management about the fumes, but without success. The next day 11 employees were sent to the employer's doctor; three were hospitalized for periods of up to two weeks. While in the hospital, the employee most severely ill from the fumes filed a complaint about the incident with the state OSHA. She was later discharged for this action and for her pro-union activity. Because it found no evidence that the employee had solicited the support of others before filing her complaint, the Board held her activity unconcerted under Meyers and therefore upheld her discharge to the extent that it was motivated by her OSHA-related activity.

The Board's opinion reveals that it believed its present construction of "concerted activities" both to be required by the NLRA and to be a return to standards used by the courts as well as by the Board itself before Alleluia. Although it conceded that "the legislative history of Section 7 does not specifically define 'concerted activity,'" the Board maintained that "it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal."[50] The Board argued that a similar interpretation emerged from an analysis of the language of section 7.[51] The Board then reviewed its pre-

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50 Meyers at 3, 115 LRRM at 1025-26.

51 Accordingly to the Board, "[t]he wording of that section demonstrates that the statute envisions 'concerted' action in terms of collective activity: the formation of or assistance to a group, or action as representative on behalf of a

Alleluia decisions to show that, "[c]onsistent with this interpretation," they had required "some sort of group action" to be present in order to find conduct to be concerted under section 7.[52] The opinion criticized Alleluia for deviating from this norm, and observed that the Board's post-Alleluia decisions had been rejected by the courts of appeals.[53] The board concluded:

> For all the foregoing reasons, we are persuaded that the [Alleluia] per se standard of concerted activity ... is at odds with the Act. The Board and

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51 Cont'd.

group." Id. at 4, 115 LRRM at 1026. This interpretation of the statutory language appears to correspond, somewhat roughly, to the standard adopted in Meyers, which holds that action is concerted if it is "engaged in with or on the authority of other employees." Id. at 12, 115 LRRM at 1029.

52 Id. at 4, 115 LRRM at 1026.

53 Id. at 8-10, 115 LRRM at 1027-28.

courts always considered, first, whether the activity is [actually] concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.

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Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity - the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby

overrule Alleluia and its progeny.[54]

As the foregoing passage makes clear, the Board believed that, in rejecting Aleluia and adopting the Meyers test it was returning to the standards applied by the courts and by the Board before Alleluia, and that this approach was "mandated by the statute itself."

Contrary to the dissent's view, it is clear from the Board's opinion that it considered not only its rejection of Alleluia but also its adoption of the Meyers standard to be required by the statute. In the passage quoted above, the Board contrasts the "per se" standard of Alleluia with the approach it claims was traditionally taken by "[t]he Board

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54 Id. at 10-11, 115 LRRM at 1028-29 (footnote omitted). The Board then proceeded to articulate its new standard for concerted activity. Id. at 11-12, 115 LRRM at 1029.

and courts," which required that conduct be actually concerted for protection under section 7. This approach, the Board maintains, "is mandated by the statute itself." The Board states shortly thereafter that it will rely "upon the 'objective' standard of concerted activity - the standard on which the Board and courts relied before Alleluia;" it then proceeds to articulate the Meyers standard. We think it could hardly be more clear that the standard the Board adopts is the same approach that it claims was "mandated by the statute itself." Moreover, the Board's adoption of the "'objective' standard" occurs almost in the same breath as its overruling of Alleluia, and was evidently regarded as based on the same rationale, the Board's view of the requirements of section 7. This reading is confirmed by the Board's opinion as a whole, which is

devoted primarily to critizing Alleluia as inconsistent with the Act and contains not a word of justification for its new standard in terms of the policies of the statute. Thus, even if the dissent were correct that the Board did not regard its adoption of that standard as statutorily compelled, it would still be necessary to remand under Chenery because in that event the Board would have given no rationale whatsoever for the standard it adopted.

Because, in our view, the Board justified its new test as required by section 7 and as a return to traditional standards for concerted activity, we consider these grounds to determine whether they are correct interpretations of law.[55]

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55 See FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953); Chenery, 318 U.S. at 87.

C. The Board's Determination That the Meyers Standard is Statutorily Required.

[2] Our review of the Supreme Court's decisions interpreting section 7 convinces us that, contrary to the Board's view, the statutory language does not compel it to adopt its present definition of "concerted activities," but rather gives the Board substantial responsibility to determine the scope of that provision in light of its own policy judgment and expertise. The Court has upheld the Board's broad construction of section 7 in a variety of contexts,[56] and has emphasized that "the Board has the 'special function of applying the general provisions of the Act to the

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56 See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 98 LRRM 2717 (1978); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

complexities of industrial life.'"[57]

Last Term, in NLRB v. City Disposal Systems,[58] the Supreme Court specifically rejected the view that the Board was without authority to interpret "concerted activities" broadly to effectuate the purposes of section 7. In City Disposal, as in Meyers, a truck driver was discharged when he refused to drive a vehicle that he reasonably believed to be unsafe because of faulty brakes. Unlike Prill, however, the employee in City Disposal, James Brown, was covered by a collective bargaining agreement which permitted him to refuse to drive an unsafe vehicle unless the refusal was unjustified. The Board held Brown's

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57 NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 88 LRRM 2689 (1975) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 53 LRRM 2121 (1963) (citations omitted).

58 104 S.Ct. 1505, 115 LRRM 3193 (1984).

conduct protected under the Interboro doctrine. The Sixth Circuit, following the prevailing view in the courts of appeals, denied enforcement on the ground that Interboro was inconsistent with a literal reading of "concerted activities."[59]

Reversing the Sixth Circuit, the Supreme Court made clear that section 7 does not compel a narrowly literal interpretation of "concerted activities," but rather is to be construed by the

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59 City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005, 110 LRRM 3225 (6th Cir. 1982) (per curiam); see, e.g., Royal Dev. Co. v. NLRB, 703 F.2d 363, 374, 112 LRRM 2932 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 693-94, 112 LRRM 3152 (11th Cir. 1983), vacated, 104 S. Ct. 1699, 115 LRRM 3416 (1984); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719, 83 LRRM 2625 (5th Cir. 1973) (dictum); NLRB v. Northern Metal Co., 440 F2d 881, 884, 76 LRRM 2958 (3d Cir. 1971); see also Kohls v. NLRB, 629 F.2d 173, 176-77, 104 LRRM 3049 (D.C. Cir. 1980) (expressing doubts about the validity of Interboro), cert. denied, 450 U.S. 931, 109 LRRM 2376 (1981).

Board in light of its expertise in labor relations. While agreeing with the Meyers Board that the term "concerted activity" "clearly enough embraces the activities of employees who have joined together in order to achieve common goals,"[60] the Court emphasized that "[w]hat is not self-evident from the language of the Act ... is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity."[61]

The Court continued:

> Although one could interpret the phrase, "to engage in concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not

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60 104 S. Ct. at 1511 (citing Meyers at 3, 116 LRRM at 1025).

61 104 S.Ct. at 1511.

> confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations - activities in which a single employee can engage - as concerted activities. Indeed, even the courts that have rejected the Interboro doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone.[62]

Because the Court found that the meaning of "concerted activities" was subject to varying interpretations based on "differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for §7 to apply," it held that the question was for the Board to resolve in light of its expertise in labor relations as long as its judgment was reasonable.[63] The Court

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62 Id. (emphasis added) (footnote omitted). As the Supreme Court noted, the courts that rejected Interboro "limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee

concluded that the Interboro doctrine embodied a reasonable view, agreeing with the Board that "[t]he invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement," a process that extends from the organization of a union to the enforcement of a collective bargaining agreement achieved through group action."[64]

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62 Cont'd.

intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee." Id. at 1511 (citations omitted). After CIty Disposal, of course, it is clear that at least a third instance of individual employee action is protected under section 7 - the assertion of rights rooted in a collective bargaining agreement.

63 104 S.Ct. at 1510-11.

64 Id. at 1511-12.

The Court also found that the Interboro doctrine was not inconsistent with the congressional intent in enacting section 7.[65] Reviewing the history of that provision,[66] the Court concluded that

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65 Id. at 1512.

66 As the Court explained, the protection for concerted activities originated in §§ 6 and 20 of the Clayton Act, ch. 323, 38 Stat. 730, 731, 738 (1915) (currently codified at 15 U.S.C. § 17 (1982); 29 U.S.C. § 52 (1982)), and § 2 of the Norris-LaGuardia Act, ch. 90, 47 Stat. 70, 70 (1933)(currently codified at 29 U.S.C. § 102 (1982)). These provisions were enacted to exempt peaceful labor activities from the reach of the federal antitrust laws and the common law doctrine of unlawful conspiracy, which held that labor protests that would have been lawful if made by a single individual were nevertheless unlawful if conducted by a group. In Norris-LaGuardia Act § 2, Congress declared that it was the public policy of the United States that "the individual ... worker shall be free from the interference, restraint, or coercion, of employers ... in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Id. (emphasis added). The Clayton and Norris-LaGuardia Acts, however, granted legal protection to

66 Cont'd.

these rights only against interference by the federal courts through use of the labor injunction. When Congress adopted the National Industrial Relations Act, ch. 90, § 7(a), 48 Stat. 195 (1933), and the NLRA, ch. 372, § 7, 49 Stat. 449 (1935), it adopted the language of § 2 of the Norris-LaGuardia Act to define the rights of employees against employer coercion and discipline as well. See City Disposal, 104 S.Ct. at 1512-13. See generally Gorman & Finkin, supra note 27, at 331-46.

The petitioner, joined by the amici, argues on the basis of this history that NLRA § 7 was intended not to protect only conduct engaged in by two or more employees, but rather to extend to group conduct the same protections to which individual actions were entitled. See Brief for Petitioner at 26-29; Brief of Amici Curiae Workers' Rights Law Project (WRLP) and Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) at 11-17. This interpretation of the history of § 7 has the support of a number of commentators. See, e.g., Gorman & Finkin, supra note 27, at 331-46; Lynd. The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History, 50 Ind. L.J. 720, 726-34 (1975); Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations

Congress, in enacting section 7, had "sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[67] Most importantly, the Court observed that "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow

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66 Cont'd.

Act, 58 Tex. L. Rev. 991, 1006-08 (1980); see also Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 289 n.6, 69 LRRM 2761 (8th Cir. 1968)(Lay, J., dissenting). We find it unnecessary to consider this argument in the present case, however, since we find that, in any event, the Board was mistaken in its view that the language, history, and prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the Act.

67 104 S.Ct. at 1513.

employees combine with one another in any particular way."[68]

Thus, City Disposal makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term "concerted activities" be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA. The Board's failure in Meyers to recognize the extent of its own interpretative authority has significant consequences. For example, in the past, both the Board and some courts have held that it is necessary under certain circumstances to accord protection to individual conduct in order to protect the development of collec-

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68 Id.

tive activity.[69] Similarly, in City Disposal, the Supreme Court observed that under section 8(a)(1) of the Act "[i]t is possible ... for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities."[70] In Meyers, however, the Board failed even to consider

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69 NLRB, 414 F.2d 1345, 1347, 71 LRRM 2827 (3d Cir. 1969)("To protect concerted activities in full bloom, protection must necessarily be extended to 'intended, contemplated or even referred to' group action ... lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.") (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685, 56 LRRM 2034 (3d Cir. 1964)); cases cited in note 79 infrs.

70 104 S.Ct. at 1512 n.10.

whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions.

We recognize that the Board did not have the benefit of the Supreme Court's opinion in City Disposal when it decided Meyers, and that this fact may well have contributed to the Board's misconception of the scope of its authority under section 7. Our remand in this case will permit the Board to reconsider Meyers in light of the Supreme Court's intervening decision in City Disposal.

D. Decisions of the Courts and Board Before Alleluia

[3] We also think that the Board was mistaken in its claim that, in adopting the Meyers test, it was simply returning to "the standard on which the Board and

courts relied before Alleluia."[71] Because the Board relied on a misreading of precedent in selecting the new standard in Meyers, we remand the decision for reconsideration under the principles of Chenery.[72]

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71 Meyers at 11, 115 LRRM at 1029.

72 In its brief, Brief for NLRB at 7, 24-27, the Board urges us to uphold its decision partly because it "reasonably acquiesced" in the judicial decisions rejecting the Alleluia doctrine, see note 27 supra. This argument ignores the basic distinction between the Board's rejection of the sweeping Alleluia principle and its establishment of the new standard. The Board's rejection of Alleluia in no way required it to adopt the test enunciated in Meyers.

For other reasons as well, we find the decisions on which the Board relies to be of limited value in deciding the present case. First, many of the cases that rejected Alleluia relied on reasoning or on earlier decisions that disapproved all forms of "constructive concerted activity," including the Interboro doctrine. See, e.g., Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 n. 7, 104 LRRM 2190 (6th Cir. 1980)(finding adoption of Alleluia

72 Cont'd.

foreclosed by ARO, Inc. v. NLRB, 596 F.2d 713, 101 LRRM 2153 (6th Cir. 1979); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242, 103 LRRM 3008 (9th Cir. 1980)(relying on several decisions rejecting or criticizing Interboro); NLRB v. Dawson Cabinet Co. 566 F.2d 1079, 1082-84, 97 LRRM 2075 (8th Cir. 1977)(relying on NLRB v. Northern Metal Co., 440 F.2d 881, 76 LRRM 2958 (3d. Cir. 1971), and NLRB v. Buddies Supermarkets, Inc. 481 F.2d 714, 719-20, 83 LRRM 2625 (5th Cir. 1973)). As the Board concedes, see Brief for NLRB at 26 n.8, the rationale of such cases does not survive City Disposal.

Furthermore, many of the judicial decisions refusing to hold individual action to be concerted did not involve occupational safety or other statutory rights, but rather involved individual employee protests about job conditions. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (2d Cir. 1980); Pelton Casteel, Inc. v. NLRB 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980). In such cases, the employee's complaint may appear to the court to be little more than a "personal gripe" unworthy of protection under § 7. See Pelton Casteel, 627 F.2d at 29. Few of the cases rejecting Alleluia involved matters of safety, see, e.g., Jim Causley Pontiac, supra; Bighorn Beverage, supra, and we are aware of no such cases

72 Cont'd.

in which the conduct for which the employee was disciplined was required by law, as in the present case. In a case quite similar on its facts to Meyers, NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 107 LRRM 2926 (6th Cir. 1981), the Sixth Circuit upheld the Board's finding that a truck driver who was discharged for his safety complaints was engaged in conduct protected by § 7. While the court found that there had been considerable group involvement in the safety issue, it also relied on the principles of Alleluia, concluding that the driver was protected because he had "attempt[ed] to enforce federal safety and state inspection regulatins ... intended to provide all employees with a safe job environment and the means to protect themselves against job hazards." Id. at 445 (emphasis in original). The Board made no reference to the Lloyd A. Fry decision in its Meyers opinion; moreover, it made no effort to consider whether the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts.

The test adopted by the Board in Meyers derives from the Ninth Circuit's one-sentence per curiam opinion in Pacific Electricord Co. v. NLRB.[73] The Pacific

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72 Cont'd.

with a safe job environment and the means to protect themselves against job hazards." Id. at 445 (emphasis in original). The Board made no reference to the Lloyd A. Fry decision in its Meyers opinion; moreover, it made no effort to consider whether the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts.

73 361 F.2d 310, 63 LRRM 2064 (9th Cir. 1966)(per curiam). The Ninth Circuit's statement granting enforcement gives no indication that the test there stated is necessarily intended to be exclusive. Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980), which the Board cites as authority for its new test in addition to Pacific Electricord, see Meyers at 12 n.22, 115 LRRM at 1029 n.22, articulates no such standard, but rather holds that, to be protected under § 7, "the activity must be 'concerted' or, if undertaken by an individual ..., must be looking towards group action." 637 F.2d at 845.

Electricord standard, however, has been followed only in the Ninth Circuit, at least as an exclusive definition of concerted activity. Furthermore, the Pacific Electricord test, which had been relied upon by the Ninth Circuit in rejecting the Interboro doctrine, was effectively disapproved by the Supreme Court in City Disposal, at least insofar as it applied to individual action in the context of collective bargaining.[74] It is equally noteworthy that no other court has followed Pacific Electricord in defining "concerted activities" under section 7.[75]

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74 See Royal Dev. Co. v. NLRB, 703 F.2d 363, 372-74, 112 LRRM 2932 (9th Cir. 1983), disapproved in City Disposal, 104 S.Ct. at 1508 n.4.

75 In ARO, Inc. v. NLRB, 596 F.2d 713, 718, 101 LRRM 2153 (6th Cir. 1979), the Sixth Circuit formulated a standard for concerted activity that resembled - although it was broader than - the Pacific Electricord test adopted by the Board in Meyers:

The Board and most courts have historically taken a broader approach to defining the scope of section 7.[76] In particular,

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75 Cont'd.

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

596 F.2d at 718. In reversing the Sixth Circuit in City Disposal, the Supreme Court implicitly disapproved this standard as well, at least as applied to the assertion of rights under a collective bargaining agreement. See 104 S.Ct. at 1509-10.

76 Indeed, as early as 1953, a review of the Board's decisions found that the Board had adopted an interpretation of § 7 that in effect granted protection even to individual activity that had a tendency to further the common interests of employees. See Note, The Requirement of "Concerted" Action Under the NLRA, 53 Colum. L. Rev. 514, 516-20 (1953).

the Meyers test appears to be narrower in at least two important respects than the standards traditionally applied by the Board and the courts to define concerted activity. First, both the Board and the courts have long held that an individual who brings a group complaint to the attention of management is engaged in concerted activity even though he was not designated or authorized to be a spokesman by the group.[77] In applying the Meyers test, however, the Board has essentially required

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77 See, e.g., NLRB v. Charles H. McCauley Assocs., Inc., 667 F.2d 685, 688, 108 LRRM 2617 (5th Cir. Unit B 1981); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1349-50, 71 LRRM 2827 (3d Cir. 1969), cert. denied, 397 U.S. 935, 73 LRRM 1264 (1970), enforcing 171 NLRB 1040, 69 LRRM 1264 (1968); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 12, 47 LRRM 2260 (6th Cir. 1960), enforcing 124 NLRB 618, 44 LRRM 1439 (1959); Carbet Corp., 191 NLRB 892, 77 LRRM 1722 (1971).

that such a complaint have been specifically authorized by the group in order to be protected under section 7.[78]

Second, the courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is protected by section 7.[79]

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78 See note 48 supra.

79 See, e.g., Root-Carlin, Inc., 92 NLRB 1313, 1314, 27 LRRM 1235 (1951); Central STeel Tube Co., 48 NLRB 604, 612-13, 12 LRRM 119, enforced, 139 F.2d 489, 13 LRRM 712 (8th Cir. 1943). In Root-Carlin, an employee was discharged for discussing with various other employees the need to form a union at their plant. Holding the employee's conduct protected, the Board stated, "Manifestly, the guarantees of section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indespensable preliminary step to employee self-organization." 92 NLRB at 1314.

In Meyers, in order to maintain its view that the NLRB traditionally has required "some kind of group action" to find conduct concerted, the Board treated Root-Carlin as resting on

79 Cont'd.

the rationale that the conversations involved "interaction among employees." Meyers at 4-5, 115 LRRM at 1026. Although the Root-Carlin Board mentioned this point, 92 NLRB at n.5, it relied primarily on the policy ground that protecting such activity was essential to the development of employee self-organization. Thus, in explaining the principle the following year, the Board stated, "Group action is not deemed a prerequisite to concerted activity, for the reason that a single person's action may be the preliminary step to acting in concert." Salt River Valley Water Users Ass'n. 99 NLRB 849, 853, 30 LRRM 1156 (1952)(footnote omitted), enforced in relevant part, 206 F.2d 325, 328, 32 LRRM 2598 (9th Cir. 1953). The Board continued to follow this view in later cases. See, e.g., Mason & Hanger-Silas Mason Co., 179 NLRB 434, 439-40, 72 LRRM 1372 (1969), enforcement denied on other grounds, 449 F.2d 425, 78 LRRM 2487 (8th Cir. 1971).

The Board's opinion in Meyers also relied on Continental Mfg. Corp. 155 NLRB 255, 60 LRRM 1290 (1965), in which the Board found no concerted activity where an employee presented to management a complaint that she claimed was shared by a majority of employees although they were too frightened to speak up themselves. As our discussion has shown, we find that Continental did not represent

The leading case is Mushroom Transportation Co. v. NLRB,[80] which holds that conduct is protected if it is "engaged in with the object of initiating or inducing or preparing for group action or ... had some relation to group action in the interest of employees."[81] As the Supreme Court indicated in City Disposal, practically all courts follow Mushroom Transportation in

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79 Cont'd.

the dominant trend of the Board's pre-Alleluia decisions. See also Gorman & Finkin, supra note 27, at 297-98 & n.37 (characterizing Continental as questionable and inconsistent with Board's other decisions). Indeed, less than two months after Continental, the Board, in a decision anticipating Alleluia, held that an employee who, without authorization from other employees, filed a complaint with the Department of Labor seeking an investigation of whether her employer was in violation of the Equal Pay Act was engaged in protected concerted activity under § 7. Montgomery Ward & Co., 156 NLRB 7, 10-11, 60 LRRM 1544 (1965).

80 330 F.2d 683, 56 LRRM 2034 (3d Cir. 1964).

81 Id. at 685.

holding such conduct protected.[82] It is not clear, however, that the Meyers standard would protect an individual's efforts to induce group action.[83]

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82 104 S.Ct. atr 1511; see, e.q., Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365, 70 LRRM 3065 (4th Cir. 1969) ("The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other.").

83 Several considerations suggest that such conduct is not protected under Meyers. First, granting protection to the lone employee who seeks to induce group action is not easy to fit within the language of Meyers, and the Board's subsequent cases show that the definition generally will be construed strictly. More importantly, the Meyers Board had available to it several decades of judicial and administrative decisions construing § 7. Despite its claim to be returning to an interpretation generally accepted before Alleluia, however, it did not adopt the Mushroom Transportation standard, which is accepted, at least, as a nonexclusive standard, by most courts of appeals. Nor did it adopt the language of the ARO case, see note 75 supra, which incorporated both the Mushroom Transportation and Pacific

83 Cont'd.

Electricord standards. Instead, the Board chose to adopt the language of Pacific Electricord alone. One might assume, therefore, that the Board's choice not to endorse the language of Mushroom Transportation was deliberate.

Several decisions since Meyers contain somewhat conflicting indications on whether the Board will hold efforts to induce group action to be concerted under Meyers. In United Hydraulic Servs., Inc. 271 NLRB No. 18, 116 LRRM 1450 (June 29, 1984), the majority declined to decide the question whether an employee's distribution of a complaint to his coworkers constituted concerted activity, holding the employee's discharge unlawful on other grounds. Member Dennis would have held the conduct protected, relying not on the Meyers standard itself but on Meyers' citation to Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). See note 73 supra. In two recent cases, divided panels of the Board relied on Mushroom Transportation to hold efforts to promote group action concerted. See Walter Bruckner & Co., 273 NLRB No. 162, 118 LRRM 1127 (Dec. 14, 1984); Vought Corp., 273 NLRB No. 161, 118 LRRM 1271 (Dec. 14, 1984). In both cases, however, the majority consisted of Member Dennis (who wrote separately in United Hydraulic) and Member Zimmerman (who is no longer with the Board); Chairman Dodson dissented or declined to reach the issue.

The Mushroom Transportation standard has been given varying interpretations by the courts of appeals. Some courts have applied the standard narrowly[84] others have given it a more expansive interpretation, emphasizing the Third Circuit's statement that conduct is

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84 See, e.g., NLRB v. Datapoint Corp., 642 F.2d 123, 107 LRRM 2032 (5th Cir. Unit A 1981); Pelton Casteel Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980); NLRB v. Northern Metal Co., 440 F.2d 881, 76 LRRM 2958 (3d Cir. 1971); Indiana Gear Works v. NLRB, 371 F.2d 273, 64 LRRM 2253 (7th Cir. 1967). A number of courts relied on Mushroom Transportation to reject the Interboro doctrine. See, e.g., NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719, 83 LRRM 2625 (5th Cir. 1973); Northern Metal supra. These decisions were overruled by City Disposal. Thus, it is clear that while Mushroom Transportation generally establishes a minimum definition of concerted activity applied in the courts of appeals, it is not exhaustive.

protected if it "had some relation to group action in the interest of employees."[85] Further, a number of cases have expressed the view that an individual employee engages in concerted activity when the purpose of his acts is to promote the welfare of other workers.[86] Finally, in one case, the Sixth Circuit

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85 See, e.g., Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708, 89 LRRM 2013 (1st Cir. 1975); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355, 71 LRRM 2827 (3d Cir. 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43, 67 LRRM 2708 (9th Cir. 1968).

86 See, e.g. NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688, 108 LRRM 2612 (5th Cir. Unit B. 1981); NLRB v. Sencore, Inc., 558 F.2d 433, 434, 95 LRRM 2865 (8th Cir. 1977); Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708, 89 LRRM 2013 (1st Cir. 1975); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978, 84 LRRM 2625 (9th Cir. 1973); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 288-90, 69 LRRM 2761 (8th Cir. 1968)(Lay J., dissenting); see also Keokuk Gas Serv. Co., 580 F.2d 328, 333-34, 98 LRRM 3332 (8th Cir. 1978).

found concerted activity on facts quite close to those in Meyers.[87]

We do not undertake to decide in this case whether the Board is required to follow any particular approach to concerted activity under section 7. Rather, we review these cases in order to see whether the Board was correct in its view that, in adopting the Meyers test, it was doing no more than conforming to "the standard on which the Board and courts relied before Alleluia." As we have tried to make clear, any fair reading of judicial precedent reveals that the Board's test in Meyers is substantially narrower in important respects than the various standards for concerted activity that have been

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87 NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 107 LRRM 2926 (6th Cir. 1981).

followed by past Boards and most of the courts of appeals. We therefore conclude that, in adopting the Meyers test, the Board relied on a misinterpretation of judicial decisions and its own prior cases.

Our conclusion highlights the lack of any meaningful support for the Board's opinion in this case. Not only is the Board's decision grounded on a faulty legal premise (as shown in part III.C. supra), it is also flawed by a lack of rationale. We are therefore constrained, under the authority of Chenery, to remand this case for reconsideration by the Board.

CONCLUSION

[4] We hold that, in adopting the Meyers test of "concerted activities," the Board failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law.

The Supreme Court's decision in City Disposal makes clear that the Board is not required to give a narrowly literal interpretation to "concerted activites," but has substantial authority to "defin[e] the scope of § 7 '... in the first instance as it considers the wide variety of cases that come before it.'"[88] Moreover, we find that, contrary to the Board's view, its Meyers standard does not constitute a mere return to the standards traditionally applied by the Board and the courts to define concerted activity, but instead is substantially more restrictive.

This is not a case in which the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision

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88 City Disposal, 104 S.Ct. at 1510 (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 568, 98 LRRM 2717 (1978)).

reached."[89] As our discussion has shown, the Board and courts of appeals have taken a variety of approaches to defining "concerted activities," some of which might result in relief for the petitioner. Moreover, the result in a given case will often turn not only on the governing standard but also on the manner in which that standard is applied, and this may well be influenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act. Thus, we cannot say that the Board's error in this case clearly had no bearing on the result reached.

Rather than remand to the Board, the dissent would have this court determine for itself whether, applying the City Disposal

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89 Massachusetts Trustees v. United States, 377 U.S. 235, 248 (1964).

analysis, the conduct at issue here is sufficiently related to the actions of other employees that it should be held protected under section 7. We believe, however, that such a determination is for the Board and not for this court to make in the first instance. The dissent's extensive efforts to provide a justification for distinguishing between the assertion of rights within and without a collective bargaining context only underscore the failure of the Board to provide a reasoned basis for such a distinction in its own opinion. Our remand in this case is intended to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in City Disposal.

The dissent unaccountably characterizes our opinion as holding that the Board had discretion under section 7 to adopt the Alleluia doctrine. However, as we have

made clear, we do not find it necessary to consider the validity of Alleluia or any other test of concerted activity in this case, and we express no opinion on this issue. The dissent also urges on various grounds that remand is unnecessary because the Board's error in this case is "harmless." We do not believe that an agency decision can be sustained under any notion of "harmless error" where the agency has failed to exercise its lawful discretion and has provided no rational basis for its determination.

Although we, like the Board, find the facts of this case to be egregious, we stress that this in no way forms the basis of our decision. Nonetheless, we think that the facts of this case highlight the Board's failure to give a considered judgment on the issues involved. In the present case, the Board upheld the dis-

charge of an employee for refusing to drive a vehicle determined to be unsafe by state authorities, despite the fact that both the employee and the company were under a legal obligation not to operate the vehicle.[90] Moreover, the Board's decision in Meyers produces the anomaly that a unionized worker who complains about safety or other matters covered by a collective bargaining agreement will be held protected under Interboro and City Disposal, while an unorganized employee will be denied protection for engaging in identical conduct. We agree with the Board that its responsibility is to apply the National Labor Relations Act and not to enforce all state and federal law. This does not mean, however, that with respect to matters within its discretion, the Board should ignore the policy implications of its decisions.

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90 See note 18 supra.

Because we have determined that it was "improper for the [Board] to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts."[91] we remand the case to the Board for reconsideration of the scope of "concerted activities" under section 7.[92]

So ordered.

Dissenting Opinion

BORK, Circuit Judge, dissenting: Petitioner Prill asks this court to set

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91 FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953).

92 In view of our disposition of this case, we have no occasion to consider whether the Board's application of its new standard in this case was supported by substantial evidence.

The petitioner also argues that the Board was required to determine whether § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982), supports his argument that his conduct is protected under § 7.

aside an order of the National Labor Relations Board denying him reinstatement and other relief. The Board determined that Prill's employer, Meyers Industries, Inc., did not commit an unfair labor practice by discharging Prill, because the conduct for which Prill was discharged was not "concerted activit[y]" under section 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157 (1982). Meyers Industries, Inc., 268 NLRB No. 73, 115 LRRM 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers"). In my view, the Board reached a result that seems to me compelled by section 7. If Prill's actions might be

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92 Cont'd.

The Board declined to reach this issue on the ground that it was neither raised nor litigated by the General Counsel at the hearing. Meyers at 1 n.1, 115 LRRM at 1025 n.1. We find no basis on which to disturb this ruling by the Board.

called "concerted," almost any actions might be so characterized and the qualifying word that Congress wrote into the statute would effectively be removed from it. But, in any event, the Board's interpretation of the provision is reasonable and should be upheld without hesitation.

I.

The majority does not purport to disturb any of the Board's findings of fact in this case. It is therefore common ground that Prill was discharged for refusing to drive an unsafe vehicle and entering safety complaints about the vehicle to his employer and to state authorities. See Meyers at 15, 115 LRRM at 1030. It is also common ground that "Prill alone refused to drive the truck and trailer: he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio

authorities. Prill acted solely on his own behalf." Meyers at 16, 115 LRRM at 1030. Moreover, it is undisputed that as to a similar complaint made in Prill's presence by another driver, one Gove, about the same vehicle, "the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition." Meyers at 16-17, 115 LRRM at 1030.

In the course of applying section 7 to this case, the Board overrules its decision in Alleluia Cushion Co., 221 NLRB 999, 1000, 91 LRRM 1131 (1975), which had held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to

be concerted." The Board held that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act," and asserted that it would instead rely "upon the 'objective' standard of concerted activity - the standard on which the Board and the courts relied before Alleluia." Meyers at 11, 115 LRRM at 1028-29. The Board then proceeded to set forth a definition of concerted activity that "is an attempt at a comprehensive one, [but] we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law." Id. 115 LRRM at 1029. The Meyers reformulation is as follows: "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of

other employees, and not solely by and on behalf of the employee himself." Id. at 12, 115 LRRM at 1029 (footnote omitted).

The majority does not dispute that, if the Meyers test is valid, Prill's conduct is not concerted activity and therefore cannot be protected under section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1982). The majority also refrains from holding that Prill's conduct was concerted activity under section 7, and claims to "express no view on whether, under § 7, the Board may adopt the Meyers test as an act of discretion." Maj. op. at 16 n.46. Nonetheless, invoking SEC v. Chenery Corp., 318 U.S. 80 (1943), the majority sets aside the Board's order and remands this case to the Board on the grounds that "the Board misinterpreted the law in two respects." Maj. op. at 16. First, the majority argues that the Supreme Court's decision in City

Disposal System, Inc., 104 S.Ct. 1505, 115 LRRM 3193 (1984), "makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA." Maj. op. at 25. Second, the majority states that "contrary to the view expressed by the Board, we find that the Meyers test does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard." Id. at 6. Because, in the majority's view, the Board in its discretion could have adopted a definition of concerted

activity under which petitioner's conduct would be held to be concerted, remand is required. As I shall show, it is the majority rather than the Board that has misinterpreted the law, and in any event the Board's alleged mistakes, if they existed, would be harmless error under the facts of this case.

II.

A.

In this case, the Board has proposed and applied a new test which it regards as consistent with Congress' intent in employing the words "concerted activities" in section 7 of the NLRA. As the majority recognizes, "the task of defining the scope of § 7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it, and, on an issue that implicates its expertise in labor relations, a reasonable construction

by the Board is entitled to considerable deference." NLRB v. City Disposal System, Inc., 104 S.Ct. 1505, 1510, 115 LRRM 3193 (1984) (citations and quotation marks omitted). The question for decision would appear to be straightforward: is the Board's new construction of section 7 reasonable or not? The anomalous character of the majority's analysis is well shown by the fact that the majority never answers this question.

The Board's reading of section 7 is, in my view, altogether reasonable, and neither City Disposal nor any other Supreme Court decision suggests otherwise. In City Disposal, the Supreme Court upheld the Board's Interboro doctrine, under which an employee's assertion of a right created by a collective-bargaining agreement is treated as concerted activity. See Interboro Contractors, Inc., 157 NLRB 1295, 1298, 61

LRRM 1537 (1966), enforced, 388 F.2d 495, 67 LRRM 2083 (2d Cir. 1967). The Court noted that the Board in Meyers had distinguished cases involving the Interboro doctrine from the run of section 7 cases because Interboro cases concern conduct that relates back to a collective-bargaining agreement, and concluded that "[t]he Meyers case is thus of no relevance here." 104 S.Ct. at 1510 n.6.[1] That remark alone suggests, rather strongly one would think, that City Disposal does not control this case and certainly does not support the majority's position.

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1 Through the Second Cicrcuit originated the Interboro doctrine, that court found no inconsistency in rejecting the Board's later efforts - of which Alleluia is one example - to find concerted activity in "any case in which a cause advanced by an individual would redound to the benefit of his fellow employees." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). Writing for the court, Judge Friendly urged that "except in the context of agreements between an employer

The Court described the question to which its opinion was addressed as "whether the Board's application of § 7 ... is reasonable." 104 S.Ct. at 1510. The Court summarized the dispute over the Interboro doctrine as one that "merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for § 7 to apply." City Disposal, 104 S.Ct. at 1511 (emphasis added). As this language indicates, some real connection between

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1 Cont'd.

and his employees which are themselves the product of concerted activities, as in Interboro[,] § 7 ... should be read according to its terms." Id. Interboro cases were treated specially because "a collective bargaining agreement ... is itself the result of concerted activity." Id. That very rationable, of course, is central to the Supreme Court's reasoning in City Disposal, see 104 S.Ct. at 1511. Hence Ontario Knife tends to confirm the validity of the distinction between the Interboro and Alleluia doctrines drawn by the Board in Meyers, and relied on by the Supreme Court in City Disposal.

the individual's conduct and group action was presupposed by both contending viewpoints before the Court - and the Court in no way repudiated that threshold requirement. For, as the Court went on to say, the process of which the collective bargaining agreement is a part is "a single, collective activity," which "extend[s] through the enforcement of the agreement." Id. The "relationship" the Court identified between individual assertions of rights derived from a collective-bargaining agreement and group action was, moreover, essentially identical to the one it perceived between group action and the individual acts of "joining and assisting a labor organization, which § 7 explicitly recognizes as concerted," Id. at 1512. In the latter situation, the individual's "actions may be divorced in time, and in location as well, from the

actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity." Id.(emphasis added). In a footnote the Court added, "[o]f course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." Id. at 1512 n.10. The Court briefly examined the legislative history of section 7, and, finding the Interboro doctrine "fully consistent with congressional intent," id. at 1513, concluded that "the doctrine constitutes a reasonable interpretation of the Act." Id. at 1516.

City Disposal establishes only that the Interboro doctrine, which presupposes

a real and not imaginary relationship between individual conduct and group action as a condition precedent to finding concerted activity, is a reasonable interpretation of section 7. If the Board in Meyers had held that the Interboro doctrine is inconsistent with the meaning of section 7, I would agree that City Disposal would require us to reject the Board's reasoning. If the Board had held that some other type of individual conduct that was equally directly related to group action could not be deemed concerted activity consistently with section 7, I would agree that City Disposal would strongly suggest the Board was wrong. But that is not what happened here.

Meyers repudiated the Alleluia doctrine, which deems individual protest grounded in a worker protection statute to be concerted activity whether or not any other employees are involved in the

protest. Alleluia's test for concerted activity required less than a "remote" relationship between individual and group activity - it required no relationship at all. City Disposal is therefore completely consistent with the Board's determination that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act." Meyers at 11, 115 LRRM at 1028.

Beyond that, I do not think that City Disposal establishes that the Board has discretion to adhere to the Alleluia doctrine.[2] Nor is there any basis in the

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2 The majority denies that it is holding that the Board has discretion under section 7 to adopt the Alleluia doctrine. Fair enough. But the majority does not explain how its suggestion that individual complaints relating to safety statutes are distinguishable from other individual complaints, can be reconciled with the language of section 7 except by reliance on one or both of the rationales the majority identifies as underlying the Alleluia doctrine. Thus, while not directly endorsing "the sweeping Alleluia

language of section 7 for the majority's suggestion that "the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts." Maj. op. at 26 n.72. City Disposal makes clear that the words "concerted activities" were intended to reach individual conduct that is linked to group activity in any of several ways, but it reaffirms the longstanding rule that there must be both group activity and a clear nexus between that activity

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principle," maj. op. at 28 n.72, the majority also fails to show that there is a middle ground between Alleluia and the general approach taken by the Board in Meyers which, consistently with the language of section 7, could result in a finding of concerted activity in this case.

and the individual's conduct. The Alleluia doctrine destroyed the statutory requirements of group action and a nexus between that action and the individual's conduct, thereby reading the word "concerted" out of section 7 altogether. The City Disposal Court's careful effort to ground the Interboro doctrine in the language of section 7 confirms the proposition that "§ 7 ... should be read according to its terms." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). There is no reading of section 7 "according to its terms" that would allow a finding of concerted action in this case or in Alleluia-type cases generally.[3] Therefore, while I agree

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3 To be sure, there is one reading of section 7 which purports to be literal and which would ratify the Alleluia doctrine. That reading was suggested in

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3 Cont'd.

the dissenting opinion in Illinois Ruan Transport Corp. v. NLRB, 404 F.2d, 274, 281, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting): "The words 'concerted activity' are directly related and defined in terms of their intended purpose of 'collective bargaining' or other 'mutual aid or protection.' The phrases are interrelated and derive substantive meaning from each other." Id. at 288. On this reading, concerted activity may be found to exist "if there is some reasonable relationship connecting an employee's conduct with the 'mutual aid and protection' of other employees and such activity is based upon rights collectively recognized within a bargaining agreement." Id. at 289. In the dissent's view, Illinois Ruan turned on the validity of the Interboro doctrine, see id. at 283, so Judge Lay was not required to take his interpretation further than he did. Clearly, however, once the meaning of "concerted activit[y]" is defined in terms of the words that follow it, activity is concerted either if it is "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982)(emphasis added).

This reading is not truly literal, for it makes the word "concerted" in section 7 utterly superfluous: so long as an individual's conduct is for the "mutual aid or protection" of other employees it will always be deemed concerted. And both the Board in Meyers

with the majority that the Board believed it had no discretion to adhere to the Alleluia doctrine, in my view the Board's belief was entirely correct. Since an individual's appeal to a statute about worker protection involves other workers only in the sense that they "should" be concerned with such protection, it is difficult to see how that case differs from one in which an individual protests about any matter that, in the estimation of the Board or a court, "should" be of concern to other workers. Thus, by sleight of hand, Board or judicial policy replaces congressional policy, individual behavior becomes group action, and the

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3 Cont'd.

and the Supreme Court in City Disposal rejected this reading - the former explicitly, the latter implicitly but no less clearly. See infra p.8.

requirement that activity be "concerted" drops from the law.

Thus, in Meyers the Board found that "under the Alleluia analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted,' without regard to its form. This is the essence of the per se standard of concerted activity." Meyers at 9, 115 LRRM at 1027. This per se standard presumes that what "ought to be of group concern," id. at 10, 115 LRRM at 1028, is for the mutual aid or protection of other employees, and therefore that when an individual employee protests over some such matter he is engaging in concerted activity. Id. at 10, 115 LRRM at 1028. The Board contrasted this approach with the practice of the Board and the courts before Alleluia, which "generally

analyzed the concept of protected concerted activity by first considering whether some kind of group action occurred and, only then, considering whether that action was for the purpose of mutual aid or protection," Meyers at 4-5, 115 LRRM at 1026, and held that the Alleluia approach was "at odds with the Act." Id. at 10, 115 LRRM at 1028.

Precisely the same understanding informs City Disposal, where the Court noted at the outset that an employee's assertion of a right derived from a collective-bargaining agreement falls "within the 'mutual aid or protection' standard, regardless of whether the employee has his own interests most immediately in mind." City Disposal, 104 S.Ct. at 1510-11 (citation omitted). Had the Court accepted the reading of section 7 that the Board in Meyers identified as

underlying the Alleluia doctrine, it could simply have said that becuase rights contained in a collective-bargaining agreement are secured for the mutual aid or protection of all employees who work under that agreement, an individual's assertion of any such right must be deemed to be concerted activity. In fact, however, the Court drew no inference from the finding that the "mutual aid or protection" standard had been met. Instead, the Court based its decision that the Interboro doctrine is a reasonable interpretation of section 7 on the integral relationship between the process of collective bargaining - which is indisputably concerted activity - and the assertion of rights based on a collective bargaining agreement. City Disposal, then, contains no suggestion that it is within the Board's discretion to adhere to the Alleluia doctrine or to

any other theory of "constructive" concerted activity that is not grounded in the language of section 7.

B.

The majority also claims, however, that City Disposal establishes that "the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe 'concerted activities' except as indicated in the Meyers test." Maj. op at 16. This claim is flatly wrong because the Board nowhere held or implied any such thing. The Board did not say that the Act requires that exact formulation it tentatively adopted - it said that the general, pre-Alleluia approach which considers "first, whether the activity is concerted, and only then, whether it is protected," is "mandated by the statute itself." Meyers at 10, 115 LRRM at 1028.

That is simply another way of saying that section 7 does not authorize the Board to find concerted activity merely because one individual's activity concerns matters that affect the well-being of other employees, and so falls within the "mutual aid or protection" standard. This is the only aspect of its legal analysis that the Board claims is "mandated" by the Act,[4] and, as I have demonstrated in Part II-B supra, the Board's view that section 7 leaves it

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4 The Board did deny that "section 7, framed as it was to legitimatize and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of individual activity presented here." Meyers at 18, 115 LRRM at 1031. At most, that denial is a claim that the result in this case is compelled by the language and purpose of section 7 - a claim that indubitably rests on a reasonable interpretation of the statute.

without discretion on this point is entirely reasonable and fully consistent with City Disposal.[5]

C.

Even if I agreed with the majority that the Board's opinion held that section 7 required it to adopt a definition of "concerted activit[y]" no

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5 FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), on which the majority relies in reaching the conclusion that remand is required here, is simply inapposite. RCA Communications holds that when an agency reaches a result in the erroneous belief that the statute compels that result, the court should remand rather than reversing if that result might have been upheld had the agency instead relied on its discretion. Because the Board's discretion in interpreting section 7 is not broad enough to allow the Board to adhere to the Alleluia doctrine, or to hold that Prill's conduct was concerted on any other theory, there is no basis for remanding this case. Remand would be "an idle and useless formality. Chenery does not require that we convert judicial review of agency action into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6, 70 LRRM 3345 (1969).

broader than the Meyers test and even if I were convinced that such a holding was erroneous, I would not remand in this case. On the facts as we must take them, there is in my view no definition the Board could propose that would, consistently with the language of section 7, afford petitioner relief. For there is no finding here that petitioner's conduct was in any way related to group activity. In order to find concerted activity here, the Board would have been forced to hold that concert can be presumed where two employees complain about the same piece of equipment on different occasions, merely becuase the second employee to complain was aware of the first employee's protest. Obviously, the first employee's protest would not be concerted even under this presumption. Hence the Board would be treating the

second protest as concerted not because it was related to group activity but merely because it resembled another employee's individual conduct. The language of section 7 does not admit of such a reading. Since the Administrative Procedure Act requires us to review with due regard for "the rule of prejudicial error," 5 U.S.C. § 706 (1982), I would deny the petition and let the alleged infirmities in the Meyers test await challenge on another occasion.

III.

The second flaw the majority finds in Meyers is "a misreading of precedent in selecting the new standard." Maj. op. at 26. The majority's forced reading of the Meyers test wrongly presupposes that the Board intends that test to be exhaustive and resolves every doubt in favor of construing the Meyers test so

that it appears as narrow as possible. The Board, it bears emphasizing, explicitly stated that the Meyers test is not meant to be exhaustive, and may be modified as the Board grapples with the "myriad of factual situations" that can be expected to arise under section 7. Meyers at 11, 115 LRRM at 1029. It is virtually certain that there is at least one category of cases the Board would treat as exceptions to the Meyers test: cases involving the assertion of rights under a collective-bargaining agreement (for the Board specifically distinguished the Interboro line of cases, see id. at 11, 115 LRRM at 1028). The Meyers test, as applied to the facts of this holds only that Interboro case aside, the Board now requires (1) some evidence of intent to actually induce concerted activity, or (2) some evidence of mutual reliance on the

conduct or support of other employees, or (3) some evidence of an actual agreement between employees to protest a given situation, as a condition precedent to a finding of concerted action. Nothing more than this can reliably be made out from Meyers, and the majority does not establish that this interpretation of section 7 runs counter to the case law.

The proof of this is that neither of the "two important respects" in which the majority finds the Meyers test "narrower" than "the standards traditionally applied by the Board and the courts to define concerted activity," maj. op. at 30, can be established on the basis of the record and decision in the present case. The majority's initial claim, that "the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees," id. at

17, see also id. at 29, rests solely on the majority's reading of the Board's subsequent decisions in Mannington Mills, Inc., 272 NLRB No. 15, 117 LRRM 1233 (Sept. 21, 1984), and Allied Erecting & Dismantling Co., 270 NLRB No. 48, 116 LRRM 1076 (Apr. 30, 1984). See maj. op. at 17-18 & n.48."[6] In Meyers itself, the only indication given as to the Board's standard in "endorsement" cases is the Board's remark that "there is no evidence

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6 In addition, the facts of Ontario Knife Co. v. NLRB, 637 F.2d 840, 107 LRRM 2053 (2d Cir. 1980), which the Board cited as support for the Meyers test, rather clearly resemble those in Mannington Mills and Allied Erecting & Dismantling Co. Ontario Knife, which found no concerted activity in an individual employee's refusal to work, despite prior activity (in which the same employee was a participant) that was clearly concerted and related to the same issue involved in the refusal to work, see 637 F.2d at 842-43, suggests that at least this degree of strict construction has some authoritative support in the case law.

here ... that either [Prill or Gove] relied in any measure on the other when each refused to drive the truck." Meyers at 17, 115 LRRM at 1030. That reveals only that no reliance will not constitute authorization - it does not tell us how much reliance will suffice. Similarly, the principal indication in Meyers as to the scope of the words "with ... other employees" in the Meyers test is the Board's finding that "there is no evidence here that there was any concerted plan of action between Gove and Prill." Meyers at 17, 115 LRRM at 1030.[7] From this we cn infer that the

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7 What we can, I think, be confident of is that the Board does not mean that if the employer here had offered the keys to Prill's truck to each of his assembled drivers one day, and each had refused to drive it, the Board would find no concerted activity. Under such circumstances, conscious parallelism would be very strong evidence of spontaneous but quite concerted activity.

Board will not find a "concerted plan of action" where two employees complain about the same piece of equipment on different occasions, even though the second employee was aware of the first employee's protest. The Board's use of the words "concerted plan of action" suggests that some kind of agreement between the two must be established, but it remains unclear how express that agreement must be, for the record is

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7 Cont'd.

Cf. NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962) (holding a spontaneous walk-out protesting working conditions in a non-union plant concerted protected activity). The Board did say that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action." Meyers at 17, 115 LRRM at 1030, and those words could be taken to mean that even this degree of visible cooperation is not concerted activity. But that remark is dictum - and it will also bear a different, narrower, and more sensible meaning. I would give it that meaning.

barren of any evidence even suggesting agreement.

The majority's willingness to go beyond the confines of the record before us to consider how the Meyers test has been applied by the Board in subsequent cases is highly questionable. We are reviewing an order issued by the Board in this case, not a rule or regulation promulgated after notice-and-comment rulemaking, in which we must necessarily consider how the challenged rule will be applied in whatever cases are likely to arise. If the Meyers test, as applied to petitioner Prill, is a reasonable interpretation of the statute, the order should be sustained. The reasonableness of the Meyers test as applied in subsequent cases can and should be reviewed when the orders in those cases come before a court.

Moreover, even if these subsequent decisions could properly be considered here, there is simply no connection between this criticism of the Meyers test and the result reached in this case. The majority concedes that, even if the Board did misinterpret pre-Alleluia case law, remand would be inappropriate if that mistake clearly had no bearing on the substance of the decision reached as to petitioner Prill. See maj. op at 34. Since there was no evidence that other employees in any way joined in or endorsed petitioner's conduct, that branch of the majority's critique cannot possibly affect the outcome here.

The majority's second objection is that "it is not clear ... that the Meyers standard would protect an individual's efforts to induce group action." Maj. op. at 31. The majority notes that the Board declined

to reach this question in a post-Meyers case, see id. at 31 n.83, and proceeds to engage in the highly speculative enterprise of deducing, from the Board's choice of citations, that the Board will not hold individual efforts to induce group action to be concerted. Id. The majority gives the impression that the Meyers test, whose wording is borrowed from the Ninth Circuit's language in Pacific Electricord Co. v. NLRB, 361 F.2d 310, 63 LRRM 2064 (1966) (per curiam), represents a conscious choice on the Board's part to adopt a formulation that no other circuit has followed,[8] while

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8 The Board borrowed the wording of its nonexhaustive Meyers test from that one-sentence opinion, but it also cited as supporting authority Judge Friendly's trenchant opinion for the Second Circuit in Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (1980). Judge Friendly recognized that "inducement" exception to the general rule that only concerted activity comes within section 7, which he traced to the fact that '§ 7 is not limited to concerted activity per se. Instead, it pro-

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8 Cont'd.

tects the "right to engage in ... concerted activities.'" Ontario Knife Co., 637 F.2d at 844-45. Since workers have the right to engage in concerted activity, Judge Friendly agreed that "as the Third Circuit recognized in Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 56 LRRM 2034 (3 Cir. 1964), employers cannot bostruct an employee's efforts to exercise those rights. Individual activity can be protected, therefore, if it is 'looking toward group action.' Mushroom Transportation, 330 F.2d at 685."

Judge Friendly's statutory argument is a powerful one, and it indicates what is wrong with holding the Board to the standard of exactitude the majority demands of the Meyers test. The Board in Meyers focused, quite understandably, on the words "concerted activities" in section 7, and although it clearly indicated that it would treat at least some "inducement" cases as involving concerted activity, the majority is right in finding some difficulty in bringing such cases within the literal language of the Meyers test. But we are not to suppose that the Board will set that test in concrete, nor should we rush to assume that in a case in which "the right to engage in ... concerted activities" is before it, the Board will not adopt the Mushroom Transportation standard on the statutory grounds given by Judge Friendly in Ontario Knife. Here, that issue was not presented, because there was no evidence whatsoever that petitioner's conduct was "looking toward group action."

rejecting the predominant standard, which, according to the majority, is that set out in Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 56 LRRM 2034 (3d Cir. 1964). The Mushroom Transportation standard differs from the Meyers test principally in that it explicitly states that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 330 F.2d at 685.

The majority has overlooked the Board's finding that neither Prill's refusal to drive the truck nor driver Gove's earlier refusal, to which Prill was an accidental and silent witness, was "intended to enlist the support of other employees," Meyers at

17, 115 LRRM at 1031. If the majority were right in thinking that the Meyers test eliminates the "inducement" category of cases from the definition of concerted activity, the Board would have had no need to make this finding.

The majority also slights the Board's discussion of Root-Carlin, Inc., 92 NLRB 1313, 27 LRRM 1235 (1951), which the majority cites as one of the leading cases holding that individual attempts to induce concerted activity are themselves concerted. The Board in Meyers relied on Root-Carlin as one of a series of cases it read as "defin[ing] concerted activity in terms of employee interaction in support of a common goal," Meyers at 5, 115 LRRM at 1026 - cases the Board clearly approved. The Board plainly indicated that, at a minimum, individual efforts to induce group action that "involve[] only a speaker and a listener,"

id. at 5, 115 L.R.R.M. at 1026 (quoting Root-Carlin, Inc., 92 NLRB at 1314 (emphasis added by the Board in Meyers)), will be treated as concerted when the speaker, an employee, is addressing the listener, another employee.

Indeed, any fair reading of the Meyers opinion would treat it as incorporating the Mushroom Transportation standard, at least as applied by the court that framed it. It was precisely because the "interaction" among employees present in the conversation in Root-Carlin, Inc. was absent in Mushroom Transportation that the court in the latter case found that the individual employee's conduct was not concerted. It reached that result, despite the fact that the discharged employee "had been in the habit of talking to other employees and advising them as to their rights," 330 F.2d at 684, because there was no evidence that his "talks with

his fellow employees involved any effort on his part or their part to initiate or promote any concerted action to do anything about the various matters as to which [he] advised the men or to do anything about any complaints and grievances which they may have discussed with him." Id. at 684-85. A finding of no concerted activity in the present case would seem to follow a fortiori from Mushroom Transportation - for in the present case there was not even a conversation between petitioner and another employee about common grievances, let along one directed towards concerted activity.[9]

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9 The majority correctly notes that Prill talked to other drivers about the defective brakes on his truck, see Tr. at 18, J.A. at 42, but there is no indication that these conversations concerned a common grievance, e.g., a pattern of shoddy maintenance by Meyers Industries that had prompted complaints from other drivers about their trucks, or that Prill sought to enlist the aid of other drivers in any way.

The "inducement" branch of the majority's critique rests, then, on a misreading of the Meyers opinion. Beyond that, the only way in which this alleged error could possibly affect the outcome in this case would be if the Board could have held that where one employee overhears another employee's complaint (as Prill did Gove's), an effort to induce concerted activity on the second employee's part should be inferred without more. Any such inference would be preposterous, and the majority has not pointed to a single case as so holding, let alone established a clear line of authority to that effect.[10] Consequently, even if the

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10 The majority does cite a line of cases including Guernsey-Muskingum Elec. Coop., Inc. 124 NLRB 618, 44 LRRM 1439 (1959), enforced, 285 F.2d 8, 47 LRRM 2260 (6th Cir. 1960), and Hugh H. Wilson Corp., 171 NLRB 1040, 69 LRRM 1264 (1968), enforced, 414 F.2d 1345, 71 LRRM 2827 (3d Cir. 1969), in which the Board treated individual complaints as protected if they related to a matter of

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10 Cont'd.

moment to other employees and if the individual was acting for the benefit of the interested group. See maj. op. at 10 & n.24. But the holdings of those cases are little different (and, if anything, narrower) from one of the rationales the majority identifies as underlying the Alleluia doctrine: "the Board's familiar view that an individual's activity should be protected if it relates to a matter of 'mutual concern' to employees." Maj. op. at 11. That rationale, as I show in Part II-A, reads the word "concerted" out of section 7, and finds no support in City Disposal. And, while that rationale may be "familiar," it has also repeatedly been rejected by the courts of appeals; even when the courts have enforced the Board's orders, they have generally done so because they found actual group activity to which the individual employee's conduct was immediately related. See, e.g., Hugh H. Wilson Corp., 414 F.2d at 1354 (finding concerted activity because, "[i]n substance, the employees had a gripe. They assembled. They presented their grievance to management ..."); Guernsey-Muskingum Elec. Coop., 285 F.2d at 12 (finding concerted activity because "a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management").

majority's dubious criticisms of the Board's reading of the case law in Meyers prove well-founded, they are harmless error that cannot support a remand in this case.

IV.

There have been protests in recent years that the "concerted activity" requirement produces such anomalous results that anything resembling a literal reading of section 7 should be abandoned. See, e.g., Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286 (1981); see also Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 281, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting). It is a sufficient response that the choice to require that activity be concerted before it may be protected "is one decided by Congress when it drafted § 7. It is not a choice that can be undone by the courts for policy

reasons." E.I. du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1078 n.2., 113 LRRM 2931 (9th Cir. 1983). Moreover, as the four dissenting Justices in City Disposal pointed out (without controversion by the majority), "[b]y providing an increased degree of statutory coverage to employees participating in that process, the labor laws encourage and preserve the 'practice and procedure of collective bargaining.' The fact that two employees acting together receive coverage where one acting alone does not is therefore entirely consistent with the labor laws' emphasis on collective action. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 65 LRRM 2449 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 58 LRRM 2193 (1965)." City Disposal, 104 S.Ct. at 1518 (O'Connor, J., dissenting) (additional citations omitted). Because what the Board did here was compel-

led by that congressional choice, I would uphold its order.[11] I therefore respectfully dissent.

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11 The majority's suggested limitation of the Alleluia presumption of concerted activity to situations where the employee's conduct is required by laws intended to benefit all employees cannot be linked in any way to the language of section 7, and is therefore completely unpersuasive. The policy considerations that underlie the majority's suggestions should be addressed to the legislature or to the state courts as expositors of the common law. In this connection it is noteworthy that the recent adoption in some states of a "public policy" exception to the employment-at-will doctrine would appear to protect employees who find themselves in a predicament such as petitioner's. See e.g., Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25, 44 LRRM 2968 (1959); Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876, 115 LRRM (1981); Sventko v. The Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151, 115 LRRM 4613 (1976). Indeed, Michigan, where Meyers is located and where Prill was employed, has enacted a statute giving an employee who is discharged for reporting a suspected violation of federal or state law to a public body a cause of action for reinstatement with back pay. Mich. Comp. Laws Ann. §§ 15.361 to .364 (1981). That whistleblowing statute, however, did not go into effect until after Prill was discharged, and it is also unclear whether the statute's definition of "public body" includes

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11 Cont'd.

agencies of other states. See Mich. Comp. Laws Ann § 15.361(d). Even before adoption of the whistle-blowing statute, there is some reason to think that Prill would have had a cause of action under state common law. See Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 265 NV.2d 385, 115 LRRM 4361 (1978) (holding that allegations that an employee was discharged for refusing to falsify pollution control reports required by law to be filed with state agency state a claim for which relief can be granted under Michigan law). But it is not for us or the Board to pre-empt these developments.

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Nos. 85-463 and 85-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

KENNETH P. PRILL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

I. PETITIONER HAS NO STANDING TO SEEK CERTIORARI OR MOVE TO INTERVENE IN THESE CASES.

Petitioner Meyers Industries seeks certiorari in a case where it is not a party to the proceeding below. Rule 19 of the Supreme Court's rules is quite clear that only parties to a proceeding in a court of appeals may seek certiorari to that court for claimed errors. Meyers is at this stage an interloper and its petitions should both

be denied. Similarly, its motion to intervene should be denied.

II. THE COURT BELOW ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S UNTIMELY MOTION TO INTERVENE.

The proceeding in the court below began on February 21, 1984, when Respondent Prill filed his petition for review in the court of appeals. FRAP Rule 15(d) requires that Meyers, were it interested in the proceeding, should have intervened within 30 days of that date. Meyers declined to do so. Instead, it waited until 2½ months after the court of appeals' decision on the merits on February 26, 1985, to move to intervene. The court unanimously denied the motion, and then unanimously denied a petition for rehearing, a suggestion for rehearing en banc, and a motion to grant post-judgment intervention nunc pro tunc.

Rules are rules, and Prill is entitled to the benefit of them. Meyers offers unverified and purportedly equitable reasons why the 30-day time limit should have been waived: (i) its own financial difficulties, and (ii) its belief that the NLRB would adequately represent its interests in this case. The short answer to both of these is that Meyers could have intervened timely and then filed a letter brief endorsing the brief of the NLRB. It would then have the standing it seeks today.

Meyers' petition to the Supreme Court is entirely different from an appeal from a lower tribunal to a court of appeals. Thus, Meyers' arguments concerning "protecting its interests" in the Supreme Court evaporate. A party in litigation gets only two bites of the apple: trial and appeal. The law Meyers cites might be convincing if it concerned Meyers' untimely intervention in a district court so it would have access to a court of appeals. But a party has no "interest" to protect after a court of appeals decision. The Supreme Court takes cases which interest it, not us. There is no right to certiorari.

Finally, the national interest in this matter is adequately protected by the Solicitor General, who has in this case decided not to proceed in the Supreme Court. Prill agrees with that decision, and so evidently did the court of appeals. This decision was entirely within its discretion. Meyers' petition in No. 85-464 should be denied.

III. THE ISSUE PETITIONER SEEKS TO LITIGATE IS NOT RIPE FOR REVIEW.

Rule 17 of the Supreme Court rules outline the factors governing consideration of certiorari petitions. None of them apply here. First, there is no split in the circuits. Both *Prill* v. *NLRB*, 755 F.2d 941 (CADC, 1985), and *Ewing* v. *NLRB*, —— F.2d ——, 119 LRRM 3273 (CA2, 1985), reached the identical result in this case. That result was that the rule the Board promulgated in its decision below was not mandated by the National Labor Relations Act and was without adequate rationale. (App. 46, 111) Moreover, there is no possibility of employers and employees having different obligations within different circuits, because the Board is continuing to adhere to the standard it articulated below pending the remand proceedings. See e.g., *Center Ridge Co.*, 276 NLRB #15 (1985).

Second, there is no conflict with any decision of this Court. To the extent that the Supreme Court has spoken to the issues raised here, it has supported the position of Prill. *NLRB* v. *City Disposal Systems, Inc.*, —— U.S. ——, 104 S. Ct. 1505 (1984;) *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978).

Finally, the court of appeals did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. It noted that the Board's opinion in this case "contains not a word of justification for its new standard in terms of the policies of the statute" (App. 83), and remanded to let the Board take another

crack at it. On September 27, 1985, the Board received statements of position from all the parties, including Meyers Industries itself,[1] and is presumably about to render a decision. That decision could come at any time, possibly even before this Court acts on the certiorari petition.

After the Board's decision on remand, in which it presumably will thoughtfully exercise its full measure of discretion and expertise, the parties will have another opportunity to bring the matter back for review in the circuit court. That is where review properly lies. Dissatisfied parties thereafter can then come here, when the issues would be ripe. This Court would then be able to make a more informed decision. The court of appeals has thus acted with the greatest caution and consideration for the Board's and Meyers' interests. Meyers' petition in No. 85-463 should be denied.

IV. CONCLUSION

If the Board had considered the issues of this case thoughtfully in the first instance, and if Meyers itself had been sufficiently interested to intervene in the court of appeals, there might be call for Supreme Court intervention. The time may yet come when this Court will have the chance to decide it. But that should await another day.

For these reasons, both petitions for writs of certiorari should be denied.

Respectfully submitted,

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[1] Meyers also moved before the Board to stay consideration until the instant petitions are disposed of. Prill is opposing that motion.

No. 85-463 (5)

Supreme Court, U.S.
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IN THE

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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THE MEYERS DOCTRINE IS RIPE FOR REVIEW

In his Brief in Opposition, Respondent Prill argues that the decision of the National Labor Relations Board to overrule the doctrine of Alleluia Cushion Co., 221 NLRB 999 (1975) is not ripe for review because "there is no split in the circuits." In support, he cites the unanimity of the D.C. and the Second Circuit courts of appeal in this case and Ewing v. N.L.R.B., 768 F.2d 51 (2d. Cir. 1985), arguing that both Circuits reached the identical result and that no other circuits have addressed the issue. He suggests that after remand the parties will have yet another opportunity to argue their positions, the D.C. Circuit will have another opportunity to pass on the wisdom of the Board's decision, and the

case will then be ripe for review by this Court. (Resp. Br.-3).

But we maintain that the D.C. Circuit has already decided the merits of the case and that remand and rehash of the same issues, in the face of the D.C. Circuits strong opposition, would be futile. The D.C. Circuit couches its reversal of the Board's decision in terms of the Board's failure to apply its statutory discretion. In reality, the Court's decision is impregnated throughout with a clear indication that it disapproves of the Board's requirement for objective evidence.

For example, several times throughout the Court's analysis it concludes that the Board has misinterpreted the law. In its discussion of the standard of review, the Court says "We believe

that the Board misinterpreted the law in two respects." App. 53, 54. Furthermore, in its condemnation of the Meyers objective standard, the Court goes into extreme detail regarding the applicability of NLRB v. City Disposal Systems, _____ U.S. _____, 104 S.Ct. 1505 (1984), concluding that although the Board did not have the benefit of the City Disposal decision, Meyers was inconsistent with that decision and therefore a misapplication of law. App. 58-69. Moreover, the Board cites post-Meyers cases, e.g. Jefferson Electric Company, 271 NLRB No. 177, 117 LRRM 1092 (1984) as an indication that under the Meyers standard, a single employee can never be found to be engaged in concerted activities. App. 55.

We maintain that on reading the D.C. Circuit's opinion as a whole, it becomes clear that the Court has concluded that the Board erred as a matter of law by applying "a narrow test" to the interpretation of "concerted activities" in the non-collective bargaining context, and that unless the Board's interpretation on remand clearly permits a finding that a single employee can be engaged in concerted activities, it will never approve a test of the variety announced in Meyers, no matter what the rationale.

As the Legal Foundation of America, in its supporting brief amicus curiae concludes, the Court's decision is nothing more than undisguised disappro-

val of the Board's decision.[1/]

In its simplist terms, Meyers effectively eliminates the concept of "constructive concerted activity" as articulated in Alleluia Cushion and replaces the presumption of concertedness with a requirement for objective evidence. The D.C. Circuit perceives that under this test, a single employee can never be found to be engaged in concerted activity. The reluctance to permit such rule is at the core of the D.C. Circuit's decision and is amply argued throughout the opinion.

It is for this reason that we suggest that the D.C. Circuit has

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1/ Meyers Industries adopts the discussion of amicus curiae regarding the conflict existing in the Circuits concerning the interpretation of "concerted activities".

effectively held that the Board cannot interpret Section 7 to find that concerted activity, outside the collective bargaining arena, requires action by more than one employee.

CONCLUSION

For the above reasons, we respectfully disagree with the position of the Respondent that this case is not ripe, and once again urge this Court to issue a Writ of Certiorari to the D.C. Circuit.

Respectfully submitted,

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(3)

NO. 85-463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioners,

V.

KENNETH P. PRILL
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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NO. 85-463

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,

Petitioner,

V.

KENNETH P. PRILL, et al.,

Respondents.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA SUPPORTING GRANT OF WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school. It has expertise in the presentation of issues of economics and related public policy to the courts.

LFA has frequently appeared as amicus curiae in cases involving labor issues both in this honorable Supreme Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case made by Petitioner Meyers Industries, Inc.

PRELIMINARY STATEMENT

Respondent Prill is not without a remedy if his claim is valid. State law of wrongful discharge covers his situation. *See Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984) and cases therein cited, *Id.* at 396-97. Michigan, the State here in question, has squarely recognized such a claim. *Sventko v. Kroger Company*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (recognizing "public policy" exceptions to "at will" doctrine in instances of complaints of statutory violation). As is entirely appropriate, Michigan limits the claim to effectuate its chosen public policy. *See, e.g., Ohlsen v. DST Industries, Inc.*, 111 Mich. App. 580, 314, N.W.2d 699, 702 (1981) (if exclusive remedy is provided by statute, that remedy, rather than common law wrongful discharge suit, must be used).

In other words, Prill can sue for reinstatement and damages under state law here. That is appropriate, since what he has charged his employer with, in this case, is the primary violation of state highway laws.

Instead, however, Prill seeks to federalize the tort of wrongful discharge, to make it an omnipresent remedy for alleged violations of state policy in the workplace, and to pre-empt state law governing individual employment. This Court has had occasion in the past to resist such federalization of the law of torts. *E.g., United Brotherhood of Carpenters & Joiners v. Scott*, 103 S.Ct. 3352 (1983) (refusing to apply civil rights laws to class-motivated mass assault, in part because of need to avoid a general federal tort law).

In this case, the NLRB refused to federalize or pre-empt the States' diverse laws of wrongful discharge. This action was proper because, as Judge Bork observed below, if it had done otherwise it would have protected a wide variety of individually motivated work stoppages under a federal labor law of broad coverage, reading the "in concert" requirement out of the Act. That result would have caused great harm, for the reasons set out in Part II of this brief. Yet it is precisely the result that the court of appeals directed the NLRB to consider.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW REQUIRES THE BOARD TO TAKE ACTION THAT WILL PRODUCE AN INTOLERABLE CONFLICT BETWEEN THE CIRCUITS.

The court of appeals remanded this case to the National Labor Relations Board because of what it considered to be the Board's failure to "exercise the full measure of administrative discretion granted to it by Congress." *Prill v. NLRB*, 755 F.2d at 942. Yet it is clear from the Board's opinion that it has in fact exercised its discretion, and it is hard to imagine what the Board could do, short of reversing its decision, to convince the court. Given the court's undisguised disapproval of the Board's decision, *see id.* at 957, it becomes clear that the decision produces conflict among the circuits.

The decision thus mandated by the court of appeals conflicts with the Ninth Circuit's interpretation of the Act, which coincides with the Board's holding here. *Pacific Electricord Company v. NLRB*, 361 F.2d 310 (9th Cir. 1966) (per curiam). The decision similarly conflicts with the Fourth Circuit's determination that the activity must at least "look to" group action to be protected. *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980).

The decision also conflicts with the decisions of this Court, which has itself held that the "in concert" requirement does not authorize the Board to address situations of purely individual action. *E.g., International Rice Milling Company v. NLRB*, 341 U.S. 665, 670-71 (1951) (construing then-existing in concert requirement of section 8(b)(4) as "expressly limited to the inducement or encouragement of *concerted* conduct by the employees" and "aimed at concerted," as distinguished from individual, conduct) (emphasis in original); *Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50 (1975) (individual efforts to address alleged racial discrimination not protected under labor law because not concerted, but possibly protected under other laws).

These conflicts are not minor, nor are they tolerable nor avoidable. They mean that a truck driver may be protected in purely individual actions in the District of Columbia, but if he travels to work for the same employer in the Ninth or Second Circuit, he is not. Worse, it leaves the NLRB in a state of confusion and conflicting directives. The decision below would authorize the Board to prohibit discharge upon every one-employee work stoppage if only the matter at issue is "of concern" to other employees, even if all others refuse to endorse the conduct and indeed reject it. The importance of this issue has required this Court to consider the subject recently in a narrower context in *NLRB v. City Disposal, Inc.*, 104 S.Ct. 1505 (1984). The case at bar presents more substantial questions than *City Disposal*, because it raises the general problem, rather than raising the narrow circumstance of a collective bargaining agreement specifically authorizing the work stoppage at issue.

The court of appeals' remand to the Board to exercise its expertise cannot avoid the conflict, because its expertise to interpret the Act is precisely what the Board did exercise, in this very case. The relevant question is whether the Board's interpretation of the Act is reasonable. But beyond that consideration, the court of appeals clearly forces the Board to acknowledge the existence of individual conduct that can trigger satisfaction of the in concert requirement, an acknowledgement that the Board must withhold to comply with the decisions of other circuits. The problem is of intense importance to both employers and employees.

Given the persistence of the problem in numerous, finely shaded decisions by both the courts and the NLRB over the years, [1] given the Board's unsuccessful efforts to rationalize deci-

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1 The tortuous history of the decisions can be seen in Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981). Gorman's conclusions are not here relied upon, however, for the reasons given in infra note 2.

sions under its prior standard, [1a] and given the fact that the Board's decision that is here reversed merely represents a return to its earlier standard, [1b] the conflict is of the kind that most calls for this Court's review.

II. THE DECISION OF THE COURT OF APPEALS PRESENTS SUBSTANTIAL QUESTIONS THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. IN PARTICULAR, IT PRESENTS THE QUESTION WHETHER A REQUIREMENT OF ACTUAL CONCERTED ACTIVITY, AS OPPOSED TO "CONSTRUCTIVE" CONCERT, IS BASED UPON SOUND POLICY REASONS THAT ARE TO BE FOUND IN BOTH THE LEGISLATIVE HISTORY AND THE CASE LAW.

The court of appeals' reasoning was essentially that a *constructive* concert requirement could substitute for an actual one. This reasoning itself presents a substantial question that

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1a See supra note 1. The difficulty is highlighted by comparing the court of appeals' decision here with its decision in Kohls v. NLRB, 629 F.2d 173 (D. C. Cir. 1980). There, on strikingly similar facts, the same court found no concerted action. The employee had refused to drive a truck on the claim that its brakes were unsafe.

1b Before its abberational decision in Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), the Board adhered to its approach in this case. E.g., M.F.A. Milling Co., 26 N.L.R.B. 614, 626 (1940); Panaderia Sucesion Alonso, 87 N.L.R.B. 877, 880-81 (1949) (concerted activity must be "that of more than one employee"); Hunt Tool Co., 192 N.L.R.B. 145, 146 (1971) (discharge for filing workers compensation suit not violative of federal labor law).

should be decided by this Court. Amicus would show the Court, here, that an actual concert requirement serves the goals of the Act, in ways that are important enough to call for this Court's consideration.

1. *The "in concert" requirement increases the probability that protected activity will advance matters of significant concern to employees generally, rather than idiosyncratic preferences.* Without a concerted action requirement, a single employee would be able to make his own idiosyncratic interpretation of the interests of workers and to further the interests he thus chooses, regardless of the opinions of others. But the Congressional debate indicates clearly that the NLRA was intended to further a more democratic process,[2] in which concerns that were relatively widely shared were raised and negotiated through representatives of workers acting in concert.[3] The requirement

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2 References to industrial "democracy" as resulting from the Act are to be found throughout the legislative history. See Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981) (hereinafter cited as Gorman). Gorman concludes (erroneously, it is submitted) that protection of "democracy" refers to protection of unilateral individual action, and this conclusion leads him in turn to argue that individual action is protected without active or "constructive" concert—a position even the Board does not endorse. "Democracy" clearly implies discussion, majoritarianism, and group action, contrary to Gorman.

3 The "democracy" was contemplated as being exercised primarily through collective bargaining and other representative mechanisms. See Emporium Capwell Co. v. Western Addition Community Organization, 420 U. S. 50 (1975); NLRB v. R. C. Cola, 328 F.2d 974, 978-79 (5th Cir. 1964). See also National Labor Relations Act section 1 (declaration of purpose).

of actual concert makes it more likely that the disputes that consume the efforts of both labor and management will be significant and legitimate ones.

In this regard, we respectfully disagree with the lower court's implicit assumption that a single-employee, on-the-spot work stoppage must necessarily affect others positively, or that it is likely to work to the benefit of all. The bulk of the Board's cases clearly show otherwise. In many of the Board's decisions on this issue, the employee is actually trying to take rights from other employees or to give less pleasant work to his fellows, and he attempts to force adoption of his view by fiat—through a unilateral work stoppage. [4] In other Board cases, the employee has sought to shield his own nonperformance from employer response. [5] There is no basis for the assumption that a decision by one employee to take action he alone deems appropriate will work to the benefit of all, and it contravenes the fundamental assumptions of the Act.

2. *The "in concert" requirement increases the probability that the protected activity will involve a valid, true complaint, and it decreases the likelihood of pretext.* A constructive concert approach would not require that the single employee complaint it protects be true or valid or supported by the collective agreement. It need not even be probably valid; in fact, it need not even be *possibly* valid. All that such an approach would require is that there be some basis from which some one among many employees *might* conclude, in his own mind, that the complaint

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4 See cases cited in note 15 infra and accompanying text.

5 For example, in NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973), protracted negotiations were followed by a single employee's persistent efforts to set aside an outcome other employees deemed beneficial. The Board considered this conduct concerted; the Court of Appeals did not, and it denied enforcement. See also authorities cited in note 7 infra.

is well founded.[6] Since most employees can find a way of stating personal complaints in terms of purported safety concerns, comfort, working conditions, or similar arguments, an extension of *City Disposal* here would openly encourage pretextual complaints.

The Board's decisions disclose that the giving of pretextual explanations for claimed protected activity is a real and frequent problem.[7] The requirement of actual concert, of course, would not eliminate pretext, but if a complaint must be shared by several workers and acted upon by them together, the probability of pretext decreases.

3. *The "in concert" requirement sharpens the articulation of the dispute and focuses it.* The approval of individual work stoppages would encourage hasty and thoughtless action, in which a single employee may unilaterally decide on the spot to stop work and nevertheless frustrate any reasonable employer response. If several employees must act in actual concert, there is greater likelihood of careful formulation of the disputed issue, simply because they are likely to share the concern or discuss the action among themselves first. Furthermore, the complaint is more likely to be communicated in a manner that will lead to its peaceful resolution.

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6 John Sexton & Co., 217 N. L. R. B. 80 (1975); T & T Industries, 235 N. L. R. B. 517 (1978). In these cases, the Board "threw its protective net broadly, holding that section 7 protection applies even if the employee's complaint is ultimately found to lack merit." Gorman 284. As Gorman puts it, with reference to the Interboro doctrine, "[T]he Board makes no pretense that the individual's complaint must be . . . anchored in the labor contract; it will be deemed concerted activity whether or not the . . . contract actually supports the claim. . . ."

7 E.g., Indiana Gear Works v. NLRB, 371 F. 2d 273, 276 (7th Cir. 1967) (employee's action motivated by personal malice toward employer, not by claimed concern for general equity in wages). As Gorman demonstrates, the board's decision was not based upon

An example of the adverse effect of a non-concerted approach is to be found in *Indiana Gear Works v. NLRB*, [8] in which an employee publicly posted sarcastic cartoons with his own captions, cruelly and personally ridiculing the company president. He acted alone, because his fellow employees, though asked, refused to join him. He thus adopted a most counterproductive method to communicate his concern. Nevertheless, the Board ordered reinstatement (a holding based upon constructive concert); the Court of Appeals—correctly, it is submitted—denied enforcement. Concerted action would have been more likely to produce a dispute better focused toward resolution.

4. *The "in concert" requirement ultimately fosters labor peace.* The single most important policy underlying the adoption of the NLRA was the goal of labor peace.[9] The "in concert" requirement, for the reasons given above, clearly furthers this Congressional goal. "Constructive concert" would not; indeed, in several of its cases, the Board has regarded conduct as protected even when labor peace has resulted from protracted nego-

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neutral principles, and the reasoning could have supported acceptance of the "pretext" (wage equity) as well as it did the Court of Appeal's actual finding. Gorman 287; see also Northern Motor Carriers, Inc., 130 N. L. R. B. 261 (1961) (malice rather than pretext of working conditions); NLRB v. Lenkurt Elec. Co., 459 F. 2d 635, 638 (9th Cir. 1972) (dictum; same); Krispy Kreme Doughnut Corp. v. NLRB, 635 F. 2d 304 (4th Cir. 1980) (enforcement denied) (Board finding of concert rejected on evidence showing it was pretext for "a preoccupation with filing claims for compensation" and lax safety practices).

8 371 F. 2d 273, 276 (7th Cir. 1967). The Board considered this individual action protected; the Court of Appeals did not, and it denied enforcement. In several other cases, the board has considered as protected such "expressions" as a single employee suddenly halting work for reasons sufficient to him or her. Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (enforcement denied); NLRB v. Dawson Cabinet Co., 566 F. 2d 1079 (8th Cir. 1977) (enforcement denied).

9 See Section 1 of the Act (statement of purpose). "All the bill does is for the sake of peace and harmony . . . . " 79 Cong. Rec. 7673, ____th Cong., ____ Sess.(1935) (remarks of Rep. Walsh).

tiations only to be followed by a single employee's refusal to accept the negotiated outcome. [10] Furthermore, constructive concert approves the conduct of employees who unilaterally engage in sudden work refusals, [11] even though such "one-person wildcat strikes" would usually be in violation of collective agreements if engaged in by multiple employees in concert. [12]

The lower court concluded that the *City Disposal* reasoning, which involved enforcement of a collective agreement, could be extended to the present situation, which does not. The result, however, would be a grant of power to each of perhaps thousands of employees in a firm to engage in unilateral work stoppages, limited only by the need for some minimal basis for belief and by each individual's own subjective sincerity. As Judge Brown said in *NLRB v. R. C. Cola Co.*, 328 F.2d 974, 978-79 (5th Cir. 1964):

> There cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups. And just as attempted negotiation with such groups or individuals would make a mockery out of bargaining, so, too, must bargaining by single agency be kept free from divisive pressures generated by dissident elements.

The remarks of supporters of the Act in Congress lead to the same conclusion:[13]

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10 E.g., NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973) (enforcement denied).

11 See note 9 supra.

12 Cf. Gorman 355-56: "Most obviously, a no-strike provision . . . should have the same impact on a 'protest stoppage' by an individual . . . . (A) labor agreement will in most instances render unprotected an individual's stoppage . . . . "

13 79 Cong. Rec. 7673 (May 16, 1935) (remarks of Sen. Walshe).

> We are requiring employees to negotiate with the properly designated representatives of their employees in the hope of having peace, in the hope of removing misunderstanding . . . .

Congress sought to *avoid* unorganized work stoppages, not encourage them:[13a]

> National labor policy has been built on the premise that by pooling their economic strength . . . , the employees of an appropriate unit have the most effective means of bargaining . . . . The policy, therefore, extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.

A grant of authority to each individual employee to stop work for reasons sufficient to him alone is not tailored to these objectives.

5. *The "in concert" requirement prevents idiosyncratic or obstreperous employees from benefitting unfairly at the expense of fellow employees.* A constructive concert approach would not require the employee's conduct to be consistent with fellow employees' interests for it to be protected. It can be motivated entirely by a desire to benefit ones' self at the expense of all others, so long as it "relates" in some manner to working conditions.[14] This approach means that an employee attempting to obtain working conditions that he, alone, considers beneficial, and which are disadvantageous to every other employee in the shop,

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13a Id.

14 E.g., Air Surrey Corp., 229 N. L. R. B. 1064 (1977), enforcement denied on other grounds, 601 F. 2d 256 (6th Cir. 1979); Cf. NLRB v. Interforo Contractors, Inc., 388 F. 2d 495 (2d Cir. 1967) ("It is doubtful that a selfish motive negates the protection").

is nonetheless protected. Indeed, many of the Board's decisions in this area involve single-employee work refusals based on disputes over seniority or similar entitlements, in which the employee is by definition attempting to benefit himself at the expense of his fellows. [15] He may be able to obtain advantages in wages or working conditions merely because he is adamant, when they would be distributed differently if based on unhampered negotiation and agreement. One-employee work stoppages having such an effect are contrary to the most basic purposes of the Act. [16] A requirement of actual concert would not eliminate this result completely, but at the very least it would ensure that the employee must persuade some other workers of his position or involve them before acting on it.

Even a requirement that the action be of "common interest" to employees would not avoid this problem. For example, if an employee refused to drive a truck because it was not equipped with an air bag, he might be sincere and well motivated; indeed, many public interest advocates might agree with him. Only by considering the merits of the complaint, something it should not do, could the Board distinguish such a case from the present case. But to deprive the employer of any reasonable course of action in such a situation would be inconsistent with the Act, which seeks to advance the real, shared concerns of employees expressed as a group.

6. *The "in concert" requirement helps employers to react reasonably to individual employees' poor performance or work habits.* Constructive concert would mean that, if an employee is both a poor employee and a chronic complainer, management

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15 NLRB v. Selwyn Shoe Mfg. Corp., 428 F. 2d 217 (8th Cir. 1970) (employee's insubordination, based on assertation of seniority rights in effort to take work from another employee, held protected as constructively concerted); ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979) (similar; enforcement denied); Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (similar; enforcement denied).

16 See authorities cited in notes 2, 3, 10 supra.

cannot react to his poor performance without fear that a different interpretation of the facts will produce an unfair labor practice adjudication. Indeed, many of the Board's decisions in this area have involved efforts to distinguish poor performance, backbiting, and insubordination from conduct the Board has considered protected. These cases virtually always involve unpredictable inferences from diffuse and hotly contested facts.[17]

7. *The "in concert" requirement encourages resort to inexpensive alternatives for individual dispute resolution, in preference to an NLRB proceeding.* The decision below encourages resort in the first instance to an NLRB proceeding, which is an adversary trial, followed by all the briefing, findings, and appeals of litigation, with delay before trial and, sometimes, years before decision. In contrast, many employment agreements provide for more expeditious and inexpensive grievance resolution processes.[18] The Board's current practice does not even involve deferring to such contractual procedures.[19] The "in-concert" requirement would not eliminate unnecessary litigation, but it would have greater tendency to confine Board proceedings to matters in which more protracted proceedings are useful.

Harvard University President Derek Bok, himself a labor law expert, has recently criticized certain areas of labor law[20] as "fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is

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17 E.g., Ryder Tank Lines, Inc., 135 N. L. R. B. 936, enforcement denied on other grounds, 310 F. 2d 233 (5th Cir. 1962); R. J. Tower Iron Works, 144 N. L. R. B. 445 (1963); see also cases cited note 7, supra. See generally Gorman 289-93, 354 (labelling "chronic complainer" cases "troubling" and stating that they rest on "coincidence of facts.").

18 Cf. Gorman 356-57.

19 Id.

20 Bok, A Flawed System, 85 HARV. MAGAZINE 38, 40 (1983).

served." [20a] Even if not harmful, proceedings under such standards "do cost inordinate amounts of money, time and energy." One definitional question on labor issues, regarding an election, cost Harvard "over a year of effort and more than one hundred thousand dollars." Bok concludes, "Even a rich country cannot afford to spend such sums on issues of this kind." But the lower court's approach would cause proceedings to proliferate.

8. *The "in concert" requirement honors the sound policy in favor of clear definition of jurisdiction.* The doctrine that although "personal gripes" are not protected, self-interested conduct is protected if it is germane to working conditions or to some provision in a collective agreement, is a distinction so ethereal that it enables the Board to reach almost any result in almost any case. As Gorman puts it, the past decisions in this area are characterized by "elusiveness and inconsistency." [21] There is simply no clear distinction that can be made between a "personal gripe" and a "protected self-interested gripe." Sound policy dictates that the jurisdiction of an agency such as the NLRB be clearly defined. The sweep of that jurisdiction was a matter of concern to, and was carefully limited by, the Congress that passed the NLRA.[22]

20a The distinction between "personal gripes" on the one hand, and "selfish" actions germane to working conditions on the other, is such a "fine-spun application," particularly if the NLRB's differentiation of "abusive" or "opprobrious" conduct from that "related to" the collective agreement is added. See note 22 infra.

21 Gorman 299; see generally Id. at 289-310.

22 "Nothing in the language of the Act, nor its legislative history, evidences an intent on the part of Congress . . . to intrude into the day-to-day operation of an employer's business." ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979).

CONCLUSION

The decision below presents conflicts with a number of other decisions. Those conflicts are not minor, tolerable or avoidable. Furthermore, the case presents substantial questions that have not been, but should be, addressed by this Court. The "in concert" requirement serves sound policy. The Congressional debate discloses a number of goals that Congress clearly intended to advance by passage of the NLRA, and these goals in turn are advanced by a requirement of actual concert. The court of appeals' constructive concert approach is in conflict with the achievement of these congressional purposes. The Board's authority to use its expertise is decreased by this decision. This honorable Supreme Court should grant the writ of certiorari.

Respectfully submitted,

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